Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

LOREN R. SMITH,

Petitioner,

V.

BOARD OF REGENTS OF THE UNIVERSITY OF HOUSTON SYSTEM, ET AL,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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75 pp

QUESTIONS PRESENTED

1. Whether a one-year durational residency requirement to be eligible for reclassification to pay the resident rate for university tuition, augmented by a refusal to count time spent in state as a full-time university student towards this requirement, violates the Equal Protection or Due Process Clauses of the Fourteenth Amendment of the United States Constitution.

2. Whether a one-year durational residency requirement to be eligible for reclassification to pay the resident rate for university tuition, augmented by a refusal to count time spent in state for the predominant purpose of attending a university towards this requirement, violates the Equal Protection or Due Process Clauses of the Fourteenth

Amendment of the United States Constitution.

3. Whether a one-year durational residency requirement to be eligible for reclassification to pay the resident rate for university tuition, augmented by a requirement that the student be employed full-time during that year, violates the Equal Protection or Due Process Clauses of the Fourteenth Amendment of the United States Constitution.

4. Whether a one-year domiciliary requirement to be eligible for reclassification to pay the resident rate for university tuition, violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

5. Whether a one-year durational residency requirement to be eligible for

reclassification to pay the resident rate for university tuition, violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

6. Whether charging different university tuition rates based upon a student's classification as a resident or nonresident violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

LIST OF PARTIES

Loren R. Smith - Petitioner, pro se.

Board of Regents of the University of Houston System - Respondent.

Mario C. Lucchesi, in his official capacity - Respondent.

Patricia M. Cavanaugh, in her official capacity - Respondent.

Janice S. Moss, Assistant Attorney General of the State of Texas - counsel for Respondents.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED. i

LIST OF PARTIES. iv

TABLE OF CONTENTS. v

TABLE OF AUTHORITIES. vii

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES. 4

STATEMENT OF THE CASE 7

A. Factual Background 7

B. Procedural History 26

REASONS FOR GRANTING THE WRIT 28

I. Overview 28

II. Standard of Review under Minimum Scrutiny - Valid Test of "Bona Fide" Residency. 32

III. In Addition to Conflicting with the Thrust of *Vlandis*, the Opinion of the Court of Appeals Conflicts with the Opinions of other Lower Courts 42

TABLE OF CONTENTS (cont.)

PAGE

IV. This Case Presents for the First Time Statistical Evidence of Deterrent Effect to Travel and the Implication of the Fundamental Right to Travel. 45

V. Open the Borders and Increase Competition. 55

CONCLUSION. 62

TABLE OF AUTHORITIES

CASES **PAGE**

Attorney General of New York v. Soto-Lopez, 476 U.S. 898 (1986) 45

Byrnes v. University of Houston, 507 S.W.2d 815 (Tex. Civ. App.-Houston[14th Dist.] 1974, writ ref'd n.r.e.) 7

Covell v. Douglas, 501 P.2d 1047 (Colo. 1972) 44,45

Dunn v. Blumstein, 405 U.S. 274 (1972) 46

Kelm v. Carlson, 473 F.2d 1267, 1269 (6th Cir. 1973). 42

Martinez v. Bynum, 461 U.S. 321 (1983) 37-39,54,58

Robertson v. University of New Mexico, 350 F.Supp. 100 (D. N.M. 1972). 44

Shapiro v. Thompson, 394 U.S. 618 (1969) 45,46

Smith v. Board of Regents of the University of Houston System, 874 S.W.2d 706 (Tex. Civ. App.-Houston[1st Dist.] 1994, writ denied). 2,17,27

CASES (continued) **PAGE**

Starns v. Malkerson, 326 F.Supp. 234 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971) 33,36,46-48,52

Vlandis v. Kline, 412 U.S. 441 (1973) 29,30,32-35,39-40,61-63

Weaver v. Kelton, 357 F.Supp. 1106, 1110 (E.D. Tex. 1973) 42-44

Zobel v. Williams, 457 U.S. 55 (1982) 36-38,46,50

STATUTES

Texas Educ. Code Ann. § 54.052(f) (Vernon 1987) 4,5,6,43

Texas Educ. Code Ann. § 54.054 (Vernon 1987) 3,6,20,21

Texas Admin. Code § 21.23 (West 1993-94) 3,7,35,36

42 U.S.C. § 1257(a) 2

42 U.S.C. § 1983. 2,26

Supreme Court Rule 10(b). 3

Supreme Court Rule 10(c). 3

TREATISES **PAGE**

T. Parent, *Tuition Residence Requirements: A Second Look in Light of Zobel and Martinez*, 61 Ind. Law Jour. 287, 291 (1986)
. 37-39

R. Brown and D. Johnson, *A Study of the Economic Impact of Variation in the Nonresident Tuition Rate at Public Institutions of Higher Education in South Dakota*, Business Research Bureau, The University of South Dakota
. 49-54

M. Olivas, *Administering Intentions*, 59 Jour. of Higher Education, No. 3, p.263
. 28,56,59,60

M. Olivas, *Testimony of Professor Michael A. Olivas before the Texas Legislature House Committee on Higher Education*, March 11, 1985, Institute for Higher Education Law and Governance, University of Houston
. 55,56

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Petitioner, LOREN R. SMITH ("Petitioner" or "Smith) respectfully requests that this Court grant this petition for writ of certiorari, seeking

review of the judgment of the Court of Appeals for the First District of Texas in favor of respondents, BOARD OF REGENTS OF THE UNIVERSITY OF HOUSTON SYSTEM; MARIO C. LUCCHESI, IN HIS OFFICIAL CAPACITY; and PATRICIA M. CAVANAUGH, IN HER OFFICIAL CAPACITY (collectively referred to as "Respondents"). Petitioner was the plaintiff in the Trial Court and the appellant in the Court of Appeals; respondents were the defendants in the Trial Court and the appellees in the Court of Appeals. The opinion from the Court of Appeals is published at 874 S.W.2d 706 (Tex.App.--Houston[1st Dist] 1994, writ denied).

STATEMENT OF JURISDICTION

This Court has jurisdiction of this appeal under 12 U.S.C. § 1257 (a) and 42 U.S.C. § 1983. Petitioner argues herein

that this Court should grant certiorari pursuant to Supreme Court Rule 10(b), as a case wherein a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort, and pursuant to Supreme Court Rule 10(c), as a case wherein a state court has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court. The decision below upheld the challenged constitutionality of Tex.Admin.Code § 21.23 of Tex.Educ.Code § 54.054. The decision below did not reach the challenged constitutionality of

Tex.Educ.Code § 54.052(f).[1] The Respondents raised defenses of sovereign immunity and governmental immunity, which were expressly not reviewed by the Court of Appeals. Should this Court grant certiorari and reverse the holding of the Court of Appeals on the questions of constitutional law, it would be necessary to remand the case to the Court of Appeals for review on the points on sovereign and governmental immunity, and Petitioner's request for declaratory and mandamus relief.

CONSTITUTIONAL PROVISIONS AND STATUTES

1. United States Constitution, Fourteenth Amendment, Section 1:

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[1]The Court of Appeals incorrectly noted that "the constitutionality of the first statute listed above [Tex.Educ.Code Ann. § 54.052(f)(Vernon 1987)] is not an issue in this case" and that "Smith does not challenge his initial classification as a nonresident". Petitioner challenged this statute in Points of Error Five, Six and Seven. Appendix "E".

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Texas Educ. Code Ann. § 54.052(f) (Vernon 1987):

(f) An individual who is 18 years of age or over who resides out of state or who has come from outside Texas and who registers in an educational institution before having resided in Texas for a 12-

month period shall be classified as a non-resident student.

3. Texas Educ. Code Ann. § 54.054 (Vernon 1987):

A nonresident student classification is presumed to be correct as long as the residence of the individual in the state is primarily for the purpose of attending an educational institution. After residing in Texas for at least twelve (12) months, a nonresident may be reclassified as a resident student as provided in the rules and regulations adopted by the Coordinating Board, Texas College and University System. Any individual reclassified as a resident student is entitled to pay the tuition fee for a resident of Texas at any subsequent registration as long as he continues to maintain his legal residence in Texas.

4. Texas Admin. Code § 21.23 (West 1993-94) (See Appendix "M").

STATEMENT OF THE CASE

A. Factual Background

Petitioner filed suit against Respondents based on their refusal to reclassify him as a resident for tuition purposes after each of his five applications throughout the last two and one-half years of the three and one-half years he attended law school.[2] Specifically, Petitioner sought a writ of mandamus and declaratory judgments that he was been entitled to the classification of "resident" since August 1987, that he was

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[2]Petitioner sought mandamus relief upon Respondents Mario C. Lucchesi, the University's Registrar, and Patricia M. Cavanaugh, the Associate Registrar, who are responsible for the initial review of each application, and whose administrative decisions are reviewed by a three person Appeals Committee. The University of Houston and Lucchesi were similarly defendants in *Byrnes v. University of Houston*, 507 S.W.2d 815 (Tex. Civ. App.-Houston[14th Dist.] 1974, writ ref'd n.r.e.).

entitled to a refund of excess tuition paid, and that the policy that resulted in the denial of Plaintiff's requests for reclassification violates the Equal Protection Clause and Due Process Clauses of the Fourteen Amendment of the U.S. Constitution.

At the time of commencement of this case, Petitioner was a law student at the University of Houston ("the University"). Petitioner subsequently graduated on December 15, 1990. Petitioner was born in Indianapolis, Indiana, on May 7, 1963. Petitioner received a Bachelor of Science degree from Indiana University in August 1985. Petitioner then moved to Stow, Ohio to work full-time for two years as a systems analyst. Petitioner applied to and was accepted to law schools in Texas and California. Petitioner chose to

attend school at the University of Houston Law Center, beginning August 1987. Petitioner resigned from his position in Ohio in early August 1987, moved to Houston a week later, and began his legal studies later that month.

In August of 1988, after having attended the University of Houston for one year, Petitioner applied with the University to be reclassified as a resident for tuition purposes. This request was denied. Petitioner filed applications renewing his request for reclassification each of the following semesters, namely Spring 1989, Fall 1989, and Spring 1990, and Fall 1990. Petitioner was denied reclassification each of these semesters. As stipulated by the parties at trial, Petitioner was "refused reclassification after each of

his five applications either because he was not in Texas for the prior 12 months before his enrollment in the University, and he was therefore deemed to have come to Texas 'to go to school', and/or he had not been employed full-time in the state for an entire year while enrolled in school at less than part-time status." After the Fall 1990 refusal, while still a student, Petitioner filed this lawsuit.

Petitioner's domiciliary intent was unquestioned at trial. In the review process, Petitioner submitted so much information to the University in his five successive applications for reclassification, that Respondents not only admitted at trial that they had no doubt *at the time of their review* that Petitioner had "bona fide" domiciliary intent, they went so far as to stipulate

that Petitioner had, even prior to his first application, the intent to remain in Texas after graduation, with the intent to "find gainful employment in Houston upon graduation." Appendix "A".

The trial testimony of University of Houston Law Center Professor Michael A. Olivas ("Prof. Olivas") demonstrated the University had no doubts as to the "bona fides" of Petitioner's intent at the time of their review. Prof. Olivas testified not only as an expert (through his extensive writings on education law and policy), but as a fact witness with knowledge as to the actual reasons Petitioner's applications were denied, as he sat on the University appeals committee that reviewed Petitioner's appeal of his administrative denial (the highest and final level of review). First, Prof.

Olivas admitted Petitioner gave more than enough information to the University during the review process to ascertain his domiciliary intent:

> A. By the way, I do not impute dishonesty to you. I don't believe that you were dishonest.
>
> Q. Okay. And you're not saying when you look over my applications that I didn't submit enough information. I gave more -- enough information for y'all to make a reasoned approach as to my status?
>
> A. I don't even know what other information you could have given us. I certainly think we had enough information.

In particular, as of Petitioner's fifth application in Fall 1990, Petitioner documented that he had been continuously, year round, in the state for three years. From August 1987, Petitioner continuously leased apartments in Texas, year round. As of the date of his first application for reclassification, Petitioner possessed

a Texas Driver's license, a Texas Vehicle Registration and Texas Voter Registration Certificate. Petitioner had been continuously employed in Texas (either part-time or full-time) since March 1988. On March 15, 1988, during the first year of law school, Petitioner began a position as a law clerk with the Houston firm of Hughes, Watters & Askanase. Petitioner has worked there ever since, presently as an associate attorney of the firm. Prof. Olivas admitted that Petitioner "was as good as his word" on his stated domiciliary intentions, and "certainly ended up doing what he said he would do. . . ."

Petitioner took longer than the standard three years for a law student to graduate, as he dropped down to part-time status his final two semesters (Spring and

Fall 1990) due to financial difficulties. Prior to his fifth application, he had not physically stepped foot outside of Texas for three years. One official, who denied Petitioner's first application for reclassification, noted that she did not know of any students who had applied for reclassification as many times as Petitioner.

Petitioner's employer wrote letters to the University on multiple occasions to document Petitioner's employment in support of Petitioner's applications for reclassification. In one such letter, Petitioner's employer noted that during the Summer of 1989, Petitioner worked at the same firm as a "Summer Associate", which is a full-time position where the individual's potential for post-graduate employment as an associate with the firm

is evaluated.

Finally, beginning in January 1990, when Petitioner dropped to part-time status, he increased the hours he worked per week to 28 to 30 hours per week, a fact noted by his employer to the University. However, nothing short of full-time employment, defined by the University as 40 hours per week, coupled with part-time enrollment, would have qualified Petitioner for reclassification under the University's interpretation of the regulation.

> Q. So on my fourth application when I have nine hours and on my fifth application when I'm taking six hours, you could have considered me a part-time student?
>
> A. No. Considered you a part-time student?
>
> Q. Yes.
>
> A. I believe that we could have.

Q. Okay. But I would have needed to work full-time and that being 40 hours or more?

A. 40 hours during those semesters.

Q. During those semesters.

A. Yes.

Q. 28 to 30 hours is not enough?

A. No.

Prof. Olivas noted that even if the student worked full-time, the student would not be eligible for reclassification if enrolled in school full-time. "In fact, I will say that full-time for us means that you're not in school full-time".

As to the University's assessment of the Petitioner's domiciliary intent, Prof. Olivas testified:

Q. Okay. Do you think it's pos -- I noticed throughout that you said from my documents it was

apparent that I came here to go to school. Do you think it's possible that someone can pick up and go to another state and start school and be a full-time student there and have a domiciliary intent to make that their home?

A. Sure. I don't doubt that you did that. Again, I don't -- I don't question --

Q. But again --

A. I don't question your bona fideness.

When questioned at trial that the different wording Petitioner used in his later applications (the matter of fact statement by Petitioner in his Spring (fourth) and Fall (fifth) 1990 applications where he declared that he came to Texas "to reside",[3] may have been the result of cynicism because of the denial of Petitioner's prior appeals,

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[3]specifically noted in the Court of Appeal's opinion, 874 S.W.2d at 707.

Prof. Olivas remarked:

A. Well, I guess you're entitled to cynicism by that time. It more conformed to the legal language, but it didn't change the fact that your original reason for coming here by your own concession was to go to school. That's what we were determining at that time. I didn't mean to suggest that by the time we had gotten the fourth and fifth one that we didn't believe that you were coming here to reside. I believed it from the first three.

Q. Okay.

A. That was never a question.

. . . .

Q. But at least from the evidence that I gave in 1988 for my third and fourth application, there was no -- there's no doubt in you mind -- you didn't have any doubt that my intent was to be a Texan or to be domiciled in the state?

A. I had no reason to doubt that.

Q. Okay. So is there some kind of problem in the domiciliary requirement that it didn't catch the fact that my true intent was a domiciliary but at least the requirement didn't allow me to be

reclassified to meet my true intent?

A. Well, I would prefer, as I've indicated in virtually all of my writings, that it be a determination based on duration. I think that that would simplify this, but I don't think that it's improper. I think the state's entitled to do that. I mean, the state in my reading of the rights of states and benefits and according in this area, unless it's an absolute bar like Connecticut had in the Vlandis case where if you applied from outside the state you were forever barred with no appeal available. That was a clear irrebuttable presumption. It was struck down, in my view properly, by the court. I don't think that we have that system. What we do is weigh these and sniff them and look them over (indicating) and take people at their word; and on that whole record, you didn't provide the one piece that you needed, which would have been full-time employment, probably coupled with part-time enrollment; because I know that there's some ABA rules,[4] but I would say the same would have been true for

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[4]The ABA states that first-year law students should not work at all, and second or third year students should work no more than 20 hours per week. With the University requirement that Petitioner work 40 hours per week to be eligible for reclassification, Petitioner could not qualify without violating the ABA directive.

an undergraduate student. It didn't make a difference that you were a law student for that purpose.

Q. Okay. But in your mind, I was a domiciliary of the state?

A. For every other purpose other than residence.

Q. But this residence purpose bound you to make the decision that you did?

A. Oh, I felt that we were under an obligation to apply the statutes and the regulations which speak to that.

Texas requires a student originally classified as a nonresident to wait at least twelve months after arriving in Texas prior to applying for reclassification. However, this twelve month durational residency requirement is augmented by the refusal to count time spent in state for the primary purpose of attending a university towards the waiting period. Tex.Educ.Code Ann. § 54.054

(Vernon 1987). This augmentation can be directly seen in Respondents' admission in their interrogatory answer (admitted at trial) as to why they refused to reclassify Petitioner:

> **ANSWER:** Plaintiff came to Texas to attend the University of Houston Law Center and enrolled prior to establishing residency for tuition purposes. Evidence submitted by plaintiff to justify reclassification included a letter that he had lived here continuously since 1987, was working 20-30 hours per week at a law firm, and intended to take the Texas bar examination. This was not sufficient to overcome the original classification. Employment and enrollment were weighted in light of the fact that residence in Texas while in school is primarily for purposes of education, not to establish residence. Decisions of an individual as to residence are typically made after completion of education and not before.

The last two sentences of this answer are a quote from the applicable regulation from the Texas Administrative Code.

Texas universities do reclassify a

small number of students who apply for reclassification. These are students who a university deems to not be in Texas "primarily for the purpose of education." The applicable regulation from the Administrative Code specifically enumerates facts that will allow reclassification. To qualify, a student (or in some instances, his/her spouse) must either be employed full-time for one-year (while being enrolled less than part-time), purchase a homestead with a substantial down payment, or be the dependent (for income-tax purposes) of a parent or court-appointed legal guardian who is a Texas resident for at least one year prior to enrollment.[5] As admitted by

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[5]The University of Houston, being located in large metropolis, in all likelihood reclassifies a much greater number of students than universities in small towns, such as Texas A & M. The University of Houston draws more part-time students, who work full-

Prof. Olivas, these specifically enumerated "facts or actions [that are] unequivocally indicative of a fixed intention to reside permanently in the state" from the regulation are the *exclusive* showing that would entitle a student to reclassification.

> Q. Okay. Well, because of the rules, I may have all these facts out here that show that my domiciliary intent is in Texas; but I really can't prove to the committee and get reclassified as a domiciliary because I haven't satisfied the certain statutory requirements that are there?

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time and attend school part-time, often in the evening. The policy allows for reclassification of students in Texas for the "secondary purpose" of attending school; i.e, they came here for a full-time job, or to marry a Texas resident. Of the sampling of twenty students approved for reclassification whose applications were introduced by Respondents at trial, seven appeared to have "stopped out", i.e., withdrew from school for a year, ten appear to have worked full-time for a year, and three appeared to have married Texas residents who worked full-time in Texas for a year. Tex.Educ.Code § 54.056 was modified in 1985 to delete the automatic qualification for married students. The University did not submit applications of any students who qualified by "purchasing a homestead with a substantial down payment" (an impracticable requirement for most students).

A. I'd say that's it in a nutshell. We didn't -- we don't feel we have the authority to go beyond the statute in that regard.

. . . .

A. Well, by this time we had three [of Appellant's five applications] of these; and you'd not given us anything that was germane to reconsideration. You weren't working full-time. You hadn't dropped to part-time; nothing else had materially changed; and so I think it was an attempt to signal to you that unless you come up with something else that's grounded in the statute or the regulation, that we'll continue to deny it; because it's just essentially the same appeal.

Q. So nothing else is going to be -- at least at this point nothing else is going to be considered or at least be considered new evidence unless it's the fact of me dropping down to part-time, working full-time; or dropping out of school for a whole year?

A. I thought I had said that, yes.

It is impossible for full-time students seeking reclassification "based on self", i.e., not seeking to be reclassified based

upon someone else's status (spouse, parents), to be reclassified for the entirety of their college carriers so long as they remain full-time status. A student in Texas has to essentially forgo a whole year of education by either withdrawing for an entire year and reapplying for admission, or by dropping down to part-time student status while working full-time. It is this requirement of part-time enrollment coupled with gainful full-time employment, and the corresponding refusal to count time spent in state for the primary purpose of attending a university towards the one-year waiting period, that Petitioner is challenging as unconstitutional under the minimum, intermediate or strict levels of scrutiny of the Equal Protection Clause, under the Due Process Clause as an

impermissible irrebuttable presumption, and under the Due Process Clause as arbitrary and capricious.

B. Procedural History

This appeal is from the 125th Judicial District Court of Harris County, Texas, Cause No. 90-64282, Honorable Judge Don G. Humble presiding. Among other causes of action, in each of Petitioner's petitions filed with the Trial Court, Petitioner alleged that the policy violated Petitioner's rights under the Equal Protection Clause and Due Process Clause of the United States Constitution, and violated his federal constitutional rights under color of state law, invoking the court's concurrent jurisdiction under 42 U.S.C. § 1983. The case was tried to the Court (bench trial) on July 23 and 24, 1992, after which the Court took the case

under advisement. The Court signed a take-nothing judgment in favor of Respondents on October 13, 1992, rejecting each of Petitioner's causes of action, including the federal questions presented in this Petition (Appendix "D"). The federal questions presented and denied in the Trial Court and the Court of Appeals, and presented but not reviewed (writ denied) in the Texas Supreme Court, are listed in Appendix "E". In an opinion published at 874 S.W.2d 706, the First Court of Appeals, Houston, affirmed the Trial Court judgment, in cause no. 01-93-00108-CV (Appendix "F" and "G"). The Court of Appeals overruled Petitioner's Motion for Rehearing on April 28, 1994 (Appendix "H"). The Supreme Court of Texas denied Petitioner's Application for Writ of Error on October 6, 1994, with the

notation "Writ Denied" (Appendix "I"), and overruled Petitioner's Motion for Rehearing on November 22, 1994 (Appendix "J").

REASONS FOR GRANTING THE WRIT

I. Overview.

The stakes for students in the residency classification process are high. Texas charges undergraduate nonresidents a rate ten times higher than its residents. M. Olivas, *Administering Intentions*, 59 Jour. of Higher Education, No. 3, p. 263. At the graduate level, where students pay a premium rate, the Petitioner paid nonresident tuition totaling $14,520.00 over the entirety of law school. Had Petitioner been classified as a resident, he would have paid $6228.00. The spiraling cost of higher education and modern day mobility has increased these

stakes in recent years. With the ever-increasing stakes, the issues of this case will have important consequences on the tuition determination process for thousands of students each year.

The increasing stakes has yielded a sharp increase in litigation by disenchanted students in the past thirty years. However, the only guidance given by this Court on the constitutionality of university resident tuition requirements was the 1973 case of *Vlandis v. Kline*, 412 U.S. 441 (1973). In *Vlandis*, this Court struck down under the Due Process Clause a Connecticut statute that irrebuttably presumed that a student's residency status as established at the time of his application for admission would remain the same throughout the entirety of his admission at the university. *Vlandis*, 412

U.S. at 443. This Court stated its holding did not mean that under the Due Process Clause a State could not impose a bona fide residency requirement that could be met "while in student status". The Court's direction that a bona fide residency requirement should be able to be met while in student status has since been ignored by many states, including Texas, which have rewritten their statutes to cloak their review process as having a rebuttable presumption, but making reclassification nearly as difficult to obtain as the scheme struck down in Vlandis. The opinion of the Court of Appeals erodes *Vlandis* to the point that "in student status" only means "in part-time student status".

This case presents the Court with a wide range of issues that would allow the

Court to issue an "end-all" opinion on the matters of resident/nonresident tuition and reclassification. The record contains extensive expert testimony that would allow the Court to fully weigh the public policy issues involved in the resident/nonresident classification dispute. The case involved no factual disputes (the facts were stipulated, as was the admissibility of each party's exhibits - Appendix "A" and "B"), making a uncluttered record devoted to questions of law and public policy. The appeal raises the question of which of the two or three possible levels of scrutiny under the equal protection clause (minimum, intermediate, or strict) is applicable in evaluating the constitutionality of resident tuition regulations at issue. Finally, the questions presented range the

gamut of possible relief in evaluating the constitutionality of residency classification schemes. If the Court determines the minimum standard of review applies, the Court could reaffirm the holding of *Vlandis* and hold that time spent while a full-time student should not be excluded from a bona fide residency requirement. Should the Court agree that the statutes in question deter significant numbers of students from moving to another state to attend a university, and create a barrier to competition among the universities for the brightest students, the implication of the fundamental right to travel would call the validity of the entire process into question.

II. Standard of Review under Minimum Scrutiny - Valid Test of "Bona Fide" Residency.

This Court in *Vlandis* did not review

the Connecticut statute under the Equal Protection Clause, but under the Due Process Clause of the Fourteenth Amendment. The Court held that a durational residence requirement should be a test of "bona fide" residency:

> Our holding today should in no wise be taken to mean that Connecticut must classify the students in its university system as residents, for purposes of tuition and fees, just because they go there. Nor should our decision be construed to deny a State the right to impose on a student, as one element in demonstrating bona fide residence, a reasonable durational residence requirement, which can be met while in student status.*9

Vlandis, 412 U.S. at 452. The majority then distinguished the one-year durational residency requirement of *Starns v. Malkerson*, 326 F.Supp. 234 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971):

> *9 Minnesota's one-year durational residency requirement, however, differed in an important respect from

> the permanent irrebuttable presumption at issue in the present case. Under the regulation involved in Starns, a student who applied to the University from out of State could rebut the presumption of nonresidency, after having lived in the State for one year, by presenting sufficient other evidence to show bona fide domicile within Minnesota. In other words, residence within the State for one year, whether or not in student status, was merely one element which Minnesota required to demonstrate bona fide domicile. By contrast, the Connecticut statute prevents a student who applied to the University from out of State, or within a year of living out of State, from ever rebutting the presumption of nonresidence during the entire time that he remains a student, no matter how long he has been a bona fide resident of the State for other purposes. Under Minnesota's durational residency requirement, a student could qualify for in-state rates by living within the State for a year in student status; whereas under Connecticut's scheme, a person who applied from out of State can never so qualify so long as he remains in student status.

Vlandis, 412 U.S. at 452, fn.9. Central to this Court's consideration was that a "bona fide" residency requirement be able

to be met while "in student status". This Court then provided guidance as to what it viewed to be a reasonable residence requirement, quoting an attorney general's opinion:

> "In reviewing a claim of in-state status, the issue becomes essentially one of domicile. In general, the domicile of an individual is his true, fixed and permanent home and place of habitation. It is the place to which, whenever he is absent, he had the intention of returning. This general statement, however, is difficult of application. Each individual case must be decided on its own particular facts. In reviewing a claim, relevant criteria include year-round residence, voter registration, place of filing tax returns, property ownership, driver's license, car registration, marital status, *vacation employment, etc.*"

Vlandis, 412 U.S. at 454 (emphasis added). The Texas regulation specifically states that the above criteria are *not* enough to justify reclassification:

> Reclassification to resident status

> after residing in the state for 12 months cannot be based solely upon the student's or the student's spouse's employment, registration to vote, registration of a motor vehicle and payment of personal property taxes thereon, or the securing of a Texas driver's license."

Texas Admin. Code § 21.23 (West 1993-94).

In *Zobel v. Williams*, 457 U.S. 55 (1982), this Court reaffirmed the holding of *Vlandis* that a durational residency requirement must be a valid test of bona fide residence. The Court went on to undercut the predominant argument that has been propounded in support of distinguishing between residents and nonresidents, that the distinction rewards the prior tax contributions of its citizens. In doing so, this Court expressly questioned the analysis of *Starns*. *Zobel*, 457 U.S. at 64, fn.13. In *Starns*, the district court in *Starns*

upheld the "primary justification" propounded by the state that tuition residence requirements facilitate a return of prior contributions "through employment, tax payments and expenditures therein." *Starns*, 326 F.2d at 240. This Court in *Zobel* held that this is not a legitimate state interest. *Zobel*, 457 U.S. at 63.

One commentator notes that several states require one-year of residence in the state for reclassification, and then "enhance this restriction by refusing to count towards the specified waiting period time spent in the state for the predominant purpose of attending a university." T. Parent, *Tuition Residence Requirements: A Second Look in Light of Zobel and Martinez*, 61 Ind. Law Jour. 287, 289 (1986). The commentator, in arguing

the unconstitutionality of this provision, notes the irrationality of such a requirement.

> The analysis of *Zobel* and *Martinez* suggests that one typical requirement lying in this zone of uncertainty may now be especially vulnerable as more than a test of bona fide residence. These tuition residence requirements contain two distinct provisions. First, they impose a waiting period, for example, one year. Second, they specify that physical presence in the state *for the predominant purpose of attending a college or university* or other institution of higher education shall not be counted towards the specified waiting period.
>
> . . .
>
> If, however, the distinction between durational and bona fide residence requirements is to have any meaning at all in this area, a requirement which refuses to count physical presence for the predominant purpose of attending a university towards a specified waiting period must almost certainly be unconstitutional in light of *Zobel* and *Martinez*. Such a requirement does far more than act as a test of bona fide residence. In fact, such a requirement is so overinclusive as to effectively preclude *all* bona fide residents who

> applied from out of state from *ever* being considered bona fide residents during their academic careers, because the students' predominant purpose for being in the state, even if they are bona fide residents, is to attend a university. Such a requirement thus has the same effect as the irrebuttable presumption held unconstitutional in *Vlandis*. If an individual's primary purpose for being in a state is to obtain an education, such a requirement renders the person a nonresident for tuition purposes regardless of her actual domicile. The argument that such a residence requirement is unconstitutional is further bolstered by the Court's statement in *Vlandis* that its decision should not "be construed to deny a State the right to impose on a student, as one element in demonstrating bona fide residence, a reasonable durational residency requirement, which can be met *while in student status*." The Court in *Vlandis* thus recognized the grave injustice that can be worked by prohibiting all out-of-state students from ever acquiring in-state status "while in student status."

T. Parent, at 312-14 (emphasis original).

Petitioner admitted at all times that he came to Texas "to go to school". Petitioner started law school as a "full-

time student"; "student" was his primary occupation. However, Petitioner did not come to Texas *solely* to attend school, and then leave the state.[6] Petitioner came to Texas to live, "with the hope that he would find gainful employment in Houston upon graduation." Appendix "A" Petitioner specifically selected a law school in a state (and city) where he wished to live and work after graduation.

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[6]The fact that the Petitioner applied to school from out of state was central to the Appellees' review. This, however, was obviously not a factor that impressed the Supreme Court:

> [B]asing the bona fides of residency solely on where a student lived when he applied for admission to the University is using a criterion wholly unrelated to that objective. As is evident from the situation of the appellees, a student may be a bona fide resident of Connecticut even though he applied to the University from out of State. Thus, Connecticut's conclusive presumption of nonresidence, instead of ensuring that only its bona fide residents receive their full subsidy, ensures that certain of its bona fide residents, such as the appellees, do *not* receive their full subsidy, and can never do so while they remain students.

Vlandis, 412 U.S. at 448-49.

This evidence was ignored by Respondents because Petitioner had been not been gainfully employed (full-time) for a year in Texas, and therefore was deemed to have come to Texas "to go to school."

The Texas regulation presumes students are untruthful regarding their intentions. It is important, however, to distinguish the students intentions - their present intentions, and their intentions upon graduation. Under the domicile test, the individual's present intention is the applicable question, not the individual's intention four years from now.[7] In reality, the student's intention upon graduation is illusory, as many students do not have a good idea what

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[7]Prof. Olivas cited at trial University statistics that over ninety percent of University of Houston law school graduates remain in Texas after graduation, with over seventy percent remaining in the City of Houston.

their major course of study will be the next year, let alone where they will live in four years.[8]

III. In Addition to Conflicting with the Thrust of *Vlandis*, the Opinion of the Court of Appeals Conflicts with the Opinions of other Lower Courts.

Other Courts have issued opinions that conflict with the holding of the Court below that a state may refuse to count time spent as a full-time student towards the one-year waiting period. In *Weaver v. Kelton*, 357 F.Supp. 1106 (E.D. Tex. 1973), a student who was reclassified after a one-year waiting period, was challenging the constitutionality of the Texas statute requiring the one-year

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[8]The Sixth Circuit has struck down an analogous Ohio requirement that students submit proof that they will be employed in the state after graduation. *Kelm v. Carlson*, 473 F.2d 1267, 1269 (6th Cir. 1973). The Court held the statute to violate the Equal Protection Clause under even minimum scrutiny. *Kelm*, 473 F.2d at 1271-72.

waiting period, Tex.Educ.Code § 54.052(e) [now (f)]. The *Weaver* court expressly noted that it was not reviewing the underlying regulations of the Coordinating Board (implemented in the Texas Administrative Code). *Weaver*, 357 F.Supp. at 1111.

In holding the Texas statute constitutional, the Court distinguished the holding of prior cases striking down different statutory schemes.

> In those cases, the offending statutory enactments were found to create *abhorrent conditions in that once a student was classified as a nonresident it was either impossible for him to get reclassified or it was necessary for him to all but forego a whole year's education by enrolling for a low minimum number of semester hours.* Understandably, these statutes were determined to suffer constitutional infirmities; however the Texas statutes are easily distinguishable in that they make allowance for future reclassification of nonresidents after they have overcome the presumptions set out in

the statutes.

Weaver, 357 F.Supp. at 1110-11.[9] The Court in *Weaver* found the Texas statute (one-year waiting period) to be constitutional under the test of minimum scrutiny. However, the regulations of the Coordinating Board, unreviewed by *Weaver*, implement the very policy *Weaver* condemns as *abhorrent*, requiring students "to all but forego a whole year's education by enrolling for a low minimum number of hours."

The *Weaver* opinion cited approvingly of the holdings of *Robertson v. University of New Mexico*, 350 F.Supp. 100 (D. N.M. 1972), which struck down a statute that did not count any time spent in state

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[9]citing [*Vlandis*]; *Robertson v. University of New Mexico*, 350 F.Supp. 100 (D. N.M. 1972); *Covell v. Douglas*, 501 P.2d 1047 (Colo. 1972).

while enrolled in more than six semester hours towards the waiting period, and *Covell v. Douglas*, 501 P.2d 1047 (Colo. 1972), which struck down similar requirements that time spent while enrolled for more that eight hours would not be counted.

IV. This Case Presents for the First Time Statistical Evidence of Deterrent Effect to Travel and the Implication of the Fundamental Right to Travel.

In *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969), this Court noted that the fundamental right to travel was deep-rooted in constitutional jurisprudence. In *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986), the Court noted three scenarios in which the fundamental right to travel is implicated:

> A state law implicates the right to travel when it actually deters such travel, (citation omitted), when impeding travel is its primary

> objective, (citing *Zobel* and *Shapiro*), or when it uses "'any classification which serves to penalize the exercise of that right.'" (citing *Dunn v. Blumstein*, 405 U.S. 274 (1972) (quoting *Shapiro*)) Our right-to-migrate cases have principally involved the latter, indirect manner of burdening the right.

Soto-Lopez, 476 U.S. at 903. The evidence from this case show that the policies in question fall under the first type, actually deterring travel.

The federal district court in *Starns* rejected the assertion that tuition residence requirements implicate the fundamental right of interstate migration. *Starns*, 326 F.Supp. at 237-38. As this Court summarily affirmed the holding of *Starns* (not the reasoning), lower Courts have not applied strict scrutiny in subsequent tuition residence cases. However, *Starns* involved a statute that

was much more liberal than the policy at issue in this case, a statute which would have allowed Petitioner to be reclassified after his first year. Furthermore, with this Court's questioning in *Zobel* of the logic of *Starns*, and with the expert statistical evidence presented in the trial of this case that these requirements in fact significantly deter a substantial number of students from moving to another state to attend a university, Petitioner asks this Court to specifically examine whether nonresident tuition implicates the right of interstate migration.

In *Starns*, the district court made a specific finding that the one-year waiting period does not have the effect of deterring interstate travel. The district court held:

> Here, by contrast, there are no

> state of facts upon which this Court could posit, as a finding of fact, that the one-year waiting period for resident tuition purposes has as a specific objective excluding or even deterring out-of-state students from attending the University. The record indicates, in fact, that of the approximately 50,000 students enrolled in the University in the fall of 1968, over 6,000 were nonresidents. In view of these statistics, we believe that the one-year waiting period does not deter any appreciable number of persons from moving into the state. There is no basis in the record to conclude, therefore, that the operation of the one-year waiting period had an unconstitutional "chilling effect" on the assertion of the constitutional right to travel.

Starns, 326 F.Supp. at 237-38. The *Starns* plaintiff did not propound any evidence of the deterrent effect of these statutes. However, in this case, two university professors testified at trial on behalf of Petitioner, elaborating on their study that statistically demonstrated that tuition residence requirements do in fact

deter appreciable numbers of persons from moving into the state.

In their study commissioned by the Council of Presidents for the six institutions of public higher education in South Dakota, Professors Ralph J. Brown and Dennis A. Johnson ("Profs. Brown and Johnson") of the University of South Dakota applied principles of econometrics and regression analysis to determine whether fluctuations in the nonresident tuition rate had a demonstrable effect on enrollment from out-of-state. The Counsel was interested in attracting students from out of state, and the study was commissioned to determine the net cost of a unilateral liberalization of tuition policy; i.e, the offset of increased revenues from an increased enrollment (a result of lower nonresident tuition) from

the increased costs of educating more students. Profs. Brown and Johnson used admissions and price data spanning fourteen years, and graphed trends in out-of-state enrollment from six surrounding states, and from all other states and foreign countries. They found a significant correlation between an increase in nonresident tuition and a decrease in out-of-state enrollment.

The most visual demonstration of this correlation was the immediate impact of the 1978 tuition reciprocity agreement between South Dakota and Minnesota. This agreement allowed students of these two states to pay the resident tuition rate at either state's institutions. In the three year period from 1977 and 1980, Minnesota enrollment at one South Dakota public university nearly quadrupled, from 247

students to 953 students. Even more telling, when the agreement was renegotiated in 1982 to charge students the weighted average of the two state's resident tuition rates (thereby raising the relative price of South Dakota tuition, which was lower than that of Minnesota), there was an immediate corresponding drop in enrollment of Minnesota students at South Dakota schools. The correlation between the price of nonresident tuition and enrollment between Minnesota and South Dakota is perhaps graphically illustrated best by Figure 17 of the study. Appendix "K".

The study further demonstrated that the price factor of nonresident tuition is elastic. This means that for a one unit increase of the price of nonresident

tuition, there is greater than a one unit decrease in out-of-state enrollment.

Profs. Brown and Johnson testified that their findings would be applicable to other states, including Texas. As to schools such as the University of Texas and Texas A & M, which have a larger national draw than the South Dakota universities, they testified the impact is even greater. In their opinion, nonresident tuition deters a significant number of students from moving to another state to attend a public university.

Finally, Profs. Brown and Johnson were asked their opinion of the statistics cited in *Starns*. The professors testified unequivocally that the two figures used cited in *Starns* do not statistically demonstrate *anything*. One cannot look at the isolated figures that of 50,000

students enrolled at the University of Minnesota, 6,000 were nonresidents, and statistically determine that "[i]n view of these statistics, we believe that the one-year waiting period does not deter any appreciable number of persons from moving into the state." The problem with looking at just these two isolated figures is that they do not reveal whether there would have been in fact 12,000 nonresidents at the University instead of 6,000 if the policies were different.

As to the opinions and testimony of Profs. Brown and Johnson, the Trial Court found "no evidence at trial that disputed the findings of Professors Brown and Johnson, and finds their conclusions and opinions to be credible." Appendix "C".

The Court of Appeals below did not even mention the statistical evidence

presented by Petitioner as to the deterrent effect on travel. The Court of Appeals instead held the right of travel is not burdened based upon this Court's statement in *Martinez v. Bynum*, 461 U.S. 321, 328, 103 S.Ct. 1838, 1842 (1983) that "any person is free to move to a State and establish residence there." This is true, if the student can afford to pay the nonresident tuition rate for the entirety of his or her college carrier (or "purchase a homestead with a substantial down payment"). As to students without such financial resources, there can be no doubt that the policies not only penalize students who have recently exercised their right of interstate migration, they also deter significant numbers of other students from exercising that right to take up residence in another state.

V. Open the Borders and Increase Competition.

In arguing against the rationality of the refusal to reclassify students deemed to have come to Texas "to go to school", the Respondents' own expert in this case, Prof. Olivas, has testified as follows to the Texas legislature:

> I believe the current law regarding nonresidents (Section 54.054), last revised in 1971, works against the interests of the state of Texas in attracting the brightest students to attend state institutions, and should be amended. The current provision equates "residence" with "domicile" (Section 54.052 a), but then excludes students who move to Texas for college attendance from becoming Texas residents. Of course, the state has a perfect right to do this, and it joins many other states that treat student citizens the same way. *However, I believe that "closing our borders" this way prohibits Texas from recruiting and attracting the greatest talent possible; when combined with the 10-times-Texas tuition provisions, the state has erected a great wall to college student migration,* one that falsely

> assumes non-residents to be a threat to Texas students.
>
> The legislation itself is inconsistent in this regard, for it has erected several "end-runs" around Texas residency requirement and has singled out special groups for reducing or free tuition privileges. Sections 54.051 through 54.210 are chock-full of exemptions and special benefits having nothing to do with duration or domicile.

Testimony of Professor Michael A. Olivas before the Texas Legislature House Committee on Higher Education, March 11, 1985, Institute for Higher Education Law and Governance, University of Houston, Appendix "L" (emphasis added). Prof. Olivas' testimony was not followed, as Texas shortly thereafter *tightened* their policies, making "state residency even more difficult to achieve." M. Olivas, *Administering Intentions*, 59 Jour. of Higher Education at 272.

This Court should open the state

borders for competition among the universities for the "brightest students". The current system is analogous to a tariff restricting competition among universities for these students. Such a holding will not open a "pandora's box" of challenges to all residency requirements. The consideration of residency for university tuition is unique, in that even if a student begins school right after moving from another state, by definition the student now physically resides in the state he or she attends school at least nine months out of the year, as opposed to the case of someone on vacation in the state having to pay a surcharge for a nonresident fishing license. Additionally, with little exception nonresident university students have reached their age of majority, as opposed

to the unemancipated minors (*Martinez v. Bynum*), whose domiciliary intent by definition parallels that of their out-of-state parents. Finally, a holding would not effect a state's right to charge a higher or lower university tuition rate than a neighboring state, as the only reach of the Equal Protection Clause is to questions of whether the state treats its own citizens (whether established or newly arrived) with equal protection.

Should the Court grant review on Question Four, the Court could mandate a pure durational test in determining residency, i.e., a student would automatically qualify after continuous residence in the state for one year (including the summer months), and abandon the nebulous concept of "domicile" in university tuition cases. The pure

durational test is advocated by Prof. Olivas. *Administering Intentions*, 59 Jour. of Higher Education at 283-85. The practice of evaluating a student's domiciliary intent, though widespread, is ineffective.

> Forty states require the establishment of domicile *and* a waiting period, while an additional two states require domicile with no specified durational period. This leaves nine states with pure durational requirements absent intention. Upon closer examination, however, the rationales for the widespread practice of exacting declarations of intention fail to advance any substantial guarantees for establishment of domicile beyond those provided by mere durational requirements, although the cost of administering intentions is high, both in dollar terms and in the considerable ill will it exacts.

M. Olivas, *Administering Intentions*, 59 Jour. of Higher Education at 267. "This system [of evaluating domicile] has become threadbare, in may, respects, and inspires

little confidence either to administrators or to students." *Administering Intentions*, 59 Jour. of Higher Education at 265. "The entire notion of establishing domicile or a single residence is flawed, particularly when it is combined with the requirement that the student also fulfill a waiting period." *Administering Intentions*, 59 Jour. of Higher Education at 283.

Under heightened scrutiny, the Court could uphold the domicile requirement, but strike down the one-year waiting requirement (Question Five), or even hold that there is no compelling (or substantial) state interest for the continuation of the distinction between resident and nonresident university students (Question Six). While the state may have a legitimate interest in

distinguishing between what it considers resident and nonresident students, this interest is small, and is certainly not "compelling" or "substantial". The substantial interest of the students compared to the nominal interest of the state in university resident tuition cases was noted by Justice White in his concurrence in *Vlandis*:

> Here, it is enough for me that the interest involved is that of obtaining a higher education, that the difference between in-state and out-of-state tuition is substantial, and that the State, without sufficient justification, imposes a one-year residency requirement on some students but not on others, and also refuses, no matter what the circumstances, to permit the requirement to be satisfied through bona fide residence while in school. It is plain enough that the State has only the most attenuated interest in terms of administrative convenience in maintaining this bizarre pattern of discrimination among those who must or must not pay a substantial tuition to the University. The discrimination imposed by the State

> is invidious and violates the Equal Protection Clause.

Vlandis, 412 U.S. at 459 (White, J., concurring).

CONCLUSION

In the twenty-two years since the *Vlandis* opinion, states have crafted statutes so exclusive that *Vlandis* has little or no substantive effect. The Texas regulation, although it allows reclassification of a few part-time enrolled, full-time employed students, is so overexclusive as to disqualify the vast majority of students who began school shortly after moving into the state from ever being reclassified as a resident. Under the holding of the Court of Appeals, a state would presumably not even have to allow part-time students to be reclassified, and could provide a

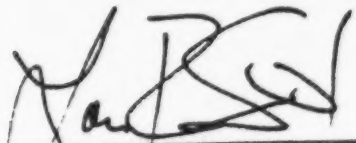
"rebuttable" presumption of nonresidency that could be rebutted only with evidence that the student withdrew from school for an entire year and thereafter re-enrolled. The opinion of the Court of Appeals relegates *Vlandis* to providing only procedural and not substantive guidance, with the result that the only practical distinction a state would have to make from the statute struck down in *Vlandis* would be that a University would have to read the student's application for reclassification.

As noted above, every state distinguishes for University tuition purposes between students they classify as residents and nonresidents, most with a one-year waiting period for reclassification, with forty-one states and the District of Columbia having a

domicile requirement, and nine states having a pure durational requirement. A large portion of the states with domicile requirements augment the waiting period with the overexclusive requirement that time spent in the state for the predominant purpose of attending a university cannot be counted towards the one-year domicile requirement. It can be expected that the majority of states will continue to draft reclassification policies as strict as possible to favor established residents over newly-arrived residents, until substantive guidance is provided by this Court under the Equal Protection Clause.

WHEREFORE, Petitioner, Loren R. Smith, prays that a writ of certiorari be granted.

Respectfully submitted,



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Supreme Court, U.S.
FILED

NO. 941603 FEB 21 1995

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

LOREN R. SMITH,

Petitioner,

V.

BOARD OF REGENTS OF THE UNIVERSITY OF HOUSTON SYSTEM, ET AL,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS

APPENDIX

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80 pp

APPENDIX TABLE OF CONTENTS

Appendix "A"	Stipulated Findings of Fact.
Appendix "B"	Trial Stipulation.
Appendix "C"	Finding of Fact.
Appendix "D"	Trial Court Judgment.
Appendix "E"	Excerpts of federal questions raised below.
Appendix "F"	Judgment of Court of Appeals.
Appendix "G"	Opinion of the Court of Appeals for the First District of Texas, rendered March 10, 1994, published at 874 S.W.2d 706.
Appendix "H"	Order of the Court of Appeals for the First District of Texas Overruling Appellant's Motion for Rehearing, rendered April 28, 1994.
Appendix "I"	Order of the Texas Supreme Court Denying Petitioner's Application for Writ of Error, rendered October 6, 1994.
Appendix "J"	Order of the Texas Supreme Court Overruling Petitioner's Motion for Rehearing, rendered November 22, 1994.

APPENDIX TABLE OF CONTENTS (cont.)

Appendix "K" Excerpts from R. Brown and D. Johnson, *A Study of the Economic Impact of Variation in the Nonresident Tuition Rate at Public Institutions of Higher Education in South Dakota*, Business Research Bureau, The University of South Dakota, Bulletin Number One Hundred Thirty-Two, ERIC Reports No. ED 314 981, HE 023 140, 1987.

Appendix "L" Excerpts from M. Olivas, *Testimony of Professor Michael A. Olivas before the Texas Legislature House Committee on Higher Education*, March 11, 1985, Institute for Higher Education Law and Governance, University of Houston.

Appendix "M" Texas Admin. Code § 21.23 (West 1993-94).

APPENDIX "A"

NO. 90-064282

LOREN R. SMITH, Plaintiff VS. BOARD OF REGENTS OF THE UNIVERSITY OF HOUSTON SYSTEM, Defendant.	§ § § § § § § § § § §	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 125TH JUDICIAL DISTRICT

STIPULATED FINDINGS OF FACT

On hearing the trial on the merits of this cause, and the Court having heard testimony and received other evidence, hereby makes the following findings of fact, as stipulated by the parties:

1. At the time of commencement of this case, Plaintiff was a law student at the University of Houston.

2. Plaintiff was born in Indianapolis, Indiana, on May 7, 1963.

3. Plaintiff attended school as an undergraduate at Indiana University, and

received a Bachelor of Science degree in August 1985.

4. Immediately after graduation from Indiana University, Plaintiff moved to Stow, Ohio to work full-time for two years as a systems analyst.

5. Plaintiff applied to and was accepted to attend Law School at the University of Houston Law Center beginning August 1987.

6. Plaintiff resigned from his position in Ohio in early August 1987, and moved to Houston a week later.

7. Plaintiff enrolled in the University of Houston Law Center in August of 1987, just two (2) weeks after moving to Texas.

8. Prior to moving to Texas in 1987, Plaintiff had only been to Texas once, to attend an ROTC camp in Corpus Christi at age 15 or 16.

9. Plaintiff came to Texas in August 1987 for the immediate purpose of attending law school, with the hope that he would find gainful employment in Houston upon graduation.

10. Plaintiff applied to four law schools, three in California and one in Texas. In addition to being accepted to the University of Houston, Plaintiff was accepted to a law school in Los Angeles.

11. From August 1987 to the present, Plaintiff has continuously leased apartments in this state.

12. As of the date of Plaintiff's first application for reclassification, Plaintiff possessed a Texas Drivers license, a Texas Vehicle Registration and a Texas Voter Registration Certificate.

13. Plaintiff has been continuously employed in this state (either part-time or full time) since March 1988. On March

15, 1988, during his first year of law school, Plaintiff began a position as a law clerk with the Houston firm of Hughes, Watters & Askanase. Plaintiff has worked there ever since, presently as an associate attorney of the firm.

14. Plaintiff did not reside in Texas 12 months prior to his enrollment in the University of Houston Law Center and therefore was classified as a non-resident in accordance with Tex. Educ. Code Ann. § 54.052(f)(Vernon 1987).

15. Plaintiff never satisfied the requirements of Tex. Admin. Code § 21.22(d) for reclassification. Plaintiff was refused reclassification after each of his five applications either because he was not in Texas for the prior 12 months before his enrollment in the University, and he was therefore deemed to have come to Texas "to go to school", and/or he had

not been employed full-time in the state for an entire year while enrolled in school at less than part-time status.

17. Plaintiff paid the following sums of money representing the difference between nonresident and resident tuition, on the following dates, by virtue of never being classified as a resident for tuition purposes:

Fee payment Date	Resident rate per/hr	Non-resident rate per/hr	Difference per/hr	Hours Billed	Total
8-14-90:	$90.00	$180.00	$90.00	6	$ 540.00
1-02-90:	$90.00	$180.00	$90.00	9	$ 810.00
8-10-89:	$90.00	$180.00	$90.00	16	$1,440.00
12-15-88:	$75.00	$165.00	$90.00	15	$1,350.00
8-31-88:	$75.00	$165.00	$90.00	11	$ 990.00
12-22-87:	$48.00	$150.00	$102.00	15	$1,530.00
8-25-87:	$48.00	$150.00	$102.00	16	$1,632.00

18. The University has reclassified

a considerable number of students to resident status after these students were initially classified as non-residents, students who satisfied the requirements enunciated by the Coordinating Board, Texas College and University System, as found in 19 Tex. Admin. Code § 21.22(d). The officials of the University are neither more liberal or less liberal in their evaluation of reclassification requests than the dictates of the Coordinating Board, as enunciated in the Administrative Code, and in exercising their discretion in determining whether the students have satisfied these *dictates.

19. Professors Ralph J. Brown and Dennis A. Johnson of the University of South Dakota testified as experts on behalf of the Plaintiff. Professor Michael A. Olivas of the University of

Houston testified as an expert on behalf of the Defendants. Professor Olivas also testified as a fact witness, having sat on the appeals committee that denied Plaintiff's request for reclassification. The Court finds all three to be qualified experts in their areas of expertise.

Signed the 15th day of November, 1992.

/s/ Don G. Humble
Honorable District Court Judge

APPROVED:

/s/ Loren R. Smith
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ATTORNEY FOR DEFENDANTS

APPENDIX "B"

NO. 90-064282

LOREN R. SMITH,	§	IN THE DISTRICT
	§	COURT OF
Plaintiff	§	
	§	
VS.	§	HARRIS COUNTY,
	§	TEXAS
BOARD OF REGENTS OF THE UNIVERSITY OF HOUSTON SYSTEM,	§	
	§	
	§	
	§	125TH JUDICIAL
Defendant.	§	DISTRICT

TRIAL STIPULATION

WHEREAS the parties to this agreement, Loren R. Smith ("Plaintiff") and the Board of Regents of the University of Houston System, Mario C. Lucchesi, Officially and Individually, and Patricia M. Cavanaugh, Officially and Individually ("Defendants") are parties in the above-styled lawsuit;

WHEREAS the parties have entered into the following agreement:

1. The parties stipulate that a reasonable attorney's fee for the

Plaintiff's prosecution of this case is as follows:

a. The amount of $10,000.00 for the trial of this lawsuit;

b. The amount of $5,000.00 if the case is appealed to the Court of Civil Appeals;

c. The amount of $3,500.00 if the case is appealed to the Texas Supreme Court;

d. The amount of $5,000.00 if the case is appealed to the United States Supreme Court.

The parties, however, do not stipulate that the Plaintiff is legally entitled to recover a reasonable attorney's fee.

2. The parties stipulate that all exhibits listed by the parties in their respective "Exhibit List of Plaintiff" and "Defendant's Exhibit List", attached to

the Joint Pretrial Order filed in this case, are admissible for all purposes, and will be deemed admitted at the outset of the trial.

Dated this 23rd day of July, 1992.

/s/ Loren R. Smith
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PLAINTIFF

/s/ John Owens
John Owens
Texas Bar No. 15379200
Assistant Attorney General
General Litigation
P.O. Box 12548, Capitol Station
Austin, Texas 78711

ATTORNEY FOR DEFENDANTS

APPENDIX "C"

NO. 90-064282

LOREN R. SMITH,	§	IN THE DISTRICT
	§	COURT OF
Plaintiff	§	
	§	
VS.	§	HARRIS COUNTY,
	§	TEXAS
BOARD OF REGENTS OF	§	
THE UNIVERSITY OF	§	
HOUSTON SYSTEM,	§	
	§	125TH JUDICIAL
Defendant.	§	DISTRICT

FINDING OF FACT

Professors Ralph J. Brown and Dennis A. Johnson of the University of South Dakota testified at trial on behalf of the Plaintiff regarding econometric models, and the statistical effect of fluctuations in the rate of nonresident tuition on enrollment. The Court has received no evidence at trial that disputed the findings of Professors Brown and Johnson, and finds their conclusions and opinions to be credible.

Signed the 15th day of November,

1992.

/s/ Don G. Humble
Honorable District Court Judge

APPROVED:

/s/ Loren R. Smith
Loren R. Smith
Texas Bar No. 18643800
1415 Louisiana, 37th Floor
Houston, Texas 77002
(713) 759-0818
Fax: (713) 759-0818

APPENDIX "D"

NO. 90-064282

LOREN R. SMITH,	§	IN THE DISTRICT COURT OF
Plaintiff	§	
VS.	§	HARRIS COUNTY, TEXAS
BOARD OF REGENTS OF THE UNIVERSITY OF HOUSTON SYSTEM,	§	
Defendant.	§	125TH JUDICIAL DISTRICT

FINAL JUDGMENT

On the 23rd day of July, 1992, came on to be heard the above-entitled and numbered cause, wherein Loren Smith is Plaintiff and Board of Regents of the University of Houston System, Mario C. Lucchesi and Patricia M. Cavanaugh are Defendants. Came on the parties in person and/or through their representatives, and by an through their attorneys of record and announced ready for trial. The parties proceeded to trial before the court - neither party having requested

trial by jury. The court thereafter reviewed the pleadings and briefs and heard the evidence and argument of counsel. The court finds that Plaintiff's causes of action against Defendants are not meritorious and that judgment should be rendered for Defendants and against Plaintiff.

It is therefore ORDERED, ADJUDGED and DECREED by the Court that:

1. Plaintiff, Loren Smith, take nothing by his suit against Defendants, Board of Regents of the University of Houston System, Mario C. Lucchesi and Patricia M. Cavanaugh (in both of their official and individual capacity; and
2. Costs of Court are taxed against the party incurring same.

Signed the 13th day of October, 1992.

/s/ Don G. Humble
JUDGE PRESIDING

APPENDIX "E"

POINT NO. 1: The trial court erred in not holding Appellees' reclassification policy violates the Equal Protection clause of the United States Constitution, as the policy is not a test of bona-fide residency, and does not satisfy even minimum scrutiny.

POINT NO. 2: The trial court erred in not holding Appellees' reclassification policy violates the due process clause of the United States Constitution, as it creates an impermissible irrebuttable presumption.

POINT NO. 3: The trial court erred in not holding Appellees' reclassification policy violates the Due Process Clause of the United States Constitution, as it is arbitrary and capricious.

POINT NO. 4: The trial court erred in not holding Appellees' reclassification policy violates the Equal Protection clause of the United States Constitution, as the policy impinges on the fundamental right to travel, but does not satisfy the applicable test of "strict scrutiny".

POINT NO. 5: The trial court erred in not mandating a pure durational test in determining residency, as the domicile test is unworkable and constitutional infirm.

POINT NO. 6: The trial court erred in not holding the one year waiting period to qualify for reclassification violates equal protection, for requirement does not withstand strict scrutiny.

POINT NO. 7: The trial court erred in not holding the distinction between residents and non-residents for tuition purposes violates the equal protection clause of the United States Constitution, as there is no compelling state interest for the distinction.

. . . .

(2) The Court could mandate a pure durational test in determining residency, i.e., a student would automatically qualify after continuous residence in the state for one year (including the summer months), without regard to the nebulous concept of "domicile". (Point No. 5).

. . . .

(3) The Court could hold the one year waiting period to qualify for reclassification violates equal protection, or even the distinction between residents and non-residents for tuition purposes violates equal protection, as there is no compelling

state interest for the distinction. (Point Nos. 6,7). . . .

APPENDIX "F"

(seal)

Court of Appeals

First District of Texas

LOREN R. SMITH,
Appellant

V.

BOARD OF REGENTS OF THE UNIVERSITY OF HOUSTON SYSTEM, MARIO C. LUCCHESI, AND PATRICIA M. CAVANAUGH, APPELLEES

Appeal from the 125th District Court of Harris County, Texas (Tr. Ct. No. 90-064282).

NO. 01-93-00108-CV

Opinion delivered by Justice Hutson-Dunn, Chief Justice Oliver-Parrott and Justice Mirabal also sitting

The cause heard today by the Court is an appeal from the judgment rendered and entered by the court below on October 13, 1992. After hearing the cause on the record of the court below and inspecting the same, it is the opinion of this Court that there was no error in the judgment. It is therefore **CONSIDERED, ADJUDGED, AND ORDERED** that the judgment of the court below be **affirmed** in all respects.

It is further **ORDERED** that appellant, LOREN SMITH, pay all costs incurred by reason of this appeal.

It is further **ORDERED** that this decision be certified below for observance.

Judgment rendered by panel consisting of Chief Justice Oliver-Parrott, Justices Hutson-Dunn and Mirabal.

Judgment entered March 10, 1994.

APPENDIX "G"

Judgment affirmed and Opinion filed March 10, 1994

(seal)

In The
Court of Appeals
For The
First District of Texas

NO.01-93-0108-CV

LOREN R. SMITH, Appellant
V.
BOARD OF REGENTS OF THE UNIVERSITY OF HOUSTON SYSTEM, ET AL, Appellee

---

On Appeal from the 125th District Court of Harris County, Texas
Trial Court Cause No. 90-64282

OPINION

Plaintiff, Loren R. Smith, a law student at the University of Houston[1], brings this action challenging the constitutionality of the policy of the University of Houston and the Coordinating

---

[1] Since the filing of this lawsuit, Smith has graduated from the University of Houston Law Center.

Board, Texas College and University System, for determining whether a nonresident student may be reclassified as a resident to qualify for resident tuition status.

BACKGROUND

Smith was born in Indianapolis, Indiana, on May 7, 1963. He received a Bachelor of Science degree from Indiana University in August 1985. After graduation, Smith moved to Stow, Ohio, and worked full time for two years as a systems analyst. Smith them decided to go to law school, and applied to schools in both Texas and California. Plaintiff was accepted to the University of Houston, resigned his position in Ohio, and moved to Texas in August 1987. Two weeks after arriving in Texas, Smith began his studies as a full-time student at the University of Houston Law Center.

In August 1988, after attending the University of Houston for one year, Smith applied to the university to be reclassified as a resident for tuition purposes. His request was refused. He filed applications renewing his request for reclassification before each of his remaining semesters at the University of Houston. Each of these requests was also denied. After his application was refused for the fall of 1990, Smith filed this lawsuit. Because Smith was classified as a nonresident, he paid tuition totalling $14,520 during his tenure in law school. Had he been classified as a resident, he would have paid $6,228.

While in law school, Smith worked part-time for a law firm in Houston. During the summers, he was able to work full-time at the law firm. However, he never maintained long term, full-time

employment. Smith had a Texas driver's license, was registered to vote in Texas, rented an apartment in Texas, and registered his car in Texas. He testified at trial that while a law student, he only left the state once. When asked why he came to Texas when he first applied for reclassification in the fall of 1988, Smith answered, "to live, attend school, and work." When he applied for reclassification in the fall of 1989, Smith declared that his purpose in coming to Texas was "to attend law school, and live and work here after graduation." When he applied in the spring of 1990 he declared that he came to Texas "to reside."

SUMMARY OF SMITH'S CONTENTIONS

In points of error two, three, and eleven, Smith contends that the reclassification policy violates the due

process clause of the fourteenth amendment of the United States Constitution because 1) it creates and irrebuttable presumption of nonresidency, and 2) it is arbitrary and capricious.

In points of error one, four, five, six, seven, and eight, Smith also argues that the State's reclassification policy violates the equal protection clause of the fourteenth amendment of the United States because it is not a bona fide residency requirement. He contends that the reclassification policy infringes upon the fundamental right to travel, and thus is subject to the strict scrutiny standard of review, rather than the more deferential rational basis analysis. In points of error nine and ten, Smith further argues that the reclassification policy violates the due process and equal protection clauses of the Texas

Constitution because it may be construed to provide greater protection than the United States Constitution. Finally, in points of error twelve and thirteen, Smith argues that the University breached a contract, either implied-in-law or implied-in-fact, by failing to reclassify him as a resident.

Smith believes that he is entitled to a refund of the difference between the amount he paid for nonresident tuition and the amount he would have paid had he been classified as a resident. In his fourteenth point of error, he also alleges that he is entitled to recover attorney's fees.

THE APPLICABLE STATUTES AND RULES

The statutes at issue in this case provide:

> (f) An individual who is 18 years of age or over who resides out of state or who has come from outside Texas and who registers in an educational

> institution before having resided in Texas for a 12-month period shall be classified as a non-resident student.

Tex. Educ. Code Ann. § 54.052(f) (Vernon 1987).

> A nonresident student classification is presumed to be correct as long as the residence of the individual in the state is primarily for the purpose of attending an educational institution. After residing in Texas for at least twelve (12) months, a nonresident may be reclassified as a resident student as provided in the rules and regulations adopted by the Coordinating Board, Texas College and University System. Any individual reclassified as a resident student is entitled to pay the tuition fee for a resident of Texas at any subsequent registration as long as he continues to maintain his legal residence in Texas.

Texas Educ. Code Ann. § 54.054 (Vernon 1987).

> Persons classified as nonresidents upon first enrollment in an institution of higher education are presumed to be nonresidents for the period during which they continue as students. If such nonresident students withdraw from school and reside in the state while gainfully employed for a period of 12 months, upon reentry into an institution of higher education they will be entitled to be reclassified as residents for tuition purposes.

Accumulations of summer and other vacation periods do not satisfy this requirement. Reclassification to resident status after residing in the state for 12 months cannot be based solely upon the student's or the student's spouse's employment, registration to vote, registration of a motor vehicle and payment of personal property taxes thereon, or the securing of a Texas driver's license. *The presumption of "nonresident" is not a conclusive presumption, however, and other facts may be considered to determine if the presumption has been overcome. Material to this determination are business or personal facts or actions unequivocally indicative of a fixed intention to reside permanently in the state. Such facts may include, but are not limited to, the length of residence and full-time employment prior to enrolling in the institution, the fact of full-time employment prior to enrolling in the institution, the fact of full-time employment and the nature of such employment while a student, purchase of a homestead with a substantial down payment, or dependency upon a parent or guardian who had resided in Texas for at least 12 months immediately preceding the student's enrollment.* All of these facts are weighed in the light of the fact that a student's residence while in school is primarily for the purpose of education and not to establish residence, and that decisions of an individual as to residence are generally made after the completion

> of an education and not before. Students classified as nonresident students shall be considered to retain that status until they make written application for reclassification in the form prescribed by the institution and are officially reclassified in writing as residents of Texas by the proper administrative officers of the institution. Application for reclassification must be submitted prior to the official census date of the relevant term.

Texas Admin. Code § 21.23 (West 1993-94)(emphasis added).

It is important to note that Smith does not challenge his initial classification as a nonresident, but contends that he should have been reclassified as a resident when he first applied for reclassification in the fall of 1988. Therefore, the constitutionality of the first statute listed above is not an issue in the case. The issue presented to this Court is whether the rules regarding the reclassification of nonresidents pass constitution muster. In

an effort to resolve this issue, we will discuss each of Smith's claims of constitution deprivation separately.

DUE PROCESS

Smith claims that the reclassification policy violates his right to due process because it creates an irrebuttable presumption of nonresidency that cannot be overcome while remaining a full-time student. Smith's claim is based on the landmark case of *Vlandis v. Kline*, 412 U.S. 441, 93 S.Ct. 2230 (1973). In *Vlandis*, the Court declared a Connecticut statute unconstitutional because it permanently classified students as nonresidents for tuition purposes on the basis of their legal address at the time they applied to the university.

> [I]t is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily

> or universally true in fact, and when the State has reasonable alternative means for making the crucial evaluation.

Vlandis, 412 U.S. at 452, 92 S.Ct. 2236.

Unlike the Connecticut statute, the reclassification rules in Texas do not permanently "freeze" a student in a nonresident status based on the student's classification at the time of application to the university. A student may obtain reclassification in any number of ways. First according to the policy on reclassification, a student will be entitled to reclassification if he or she withdraws from the University for a period of twelve months, and resides in Texas while gainfully employed. Secondly, the statute lists several factors that may result in reclassification. For example, a student may work full time in Texas, while enrolled as a student, or may purchase a homestead in Texas. Dependency

on a parent or guardian who has resided in Texas for at least 12 months is also a factor that may result in reclassification. However, the factors listed in the statute are nonexclusive; therefore, presumably there are other circumstances that would result in reclassification. The rule in question also indicates that the "presumption of 'nonresident' is not a conclusive presumption," and may be overcome by showing "facts or actions unequivocally indicative of a fixed intention to reside permanently in the state."

In *Black v. Sullivan*, 561 F.Supp. 1050, 1064-65 (D. Maine 1983), the plaintiffs claimed that a similar classification policy created an irrebuttable presumption that full-time, unmarried students were unable to overcome. The court rejected the claim

because the rules on their face did not exclude such persons from reclassification, and the plaintiffs were given a fair opportunity to demonstrate entitlement to reclassification.

We conclude that, though the burden of proof may be difficult for students such as Smith to overcome, the rules promulgated by the Coordinating Board, Texas College and University System, do not create an irrebuttable presumption.

Smith also contends that the reclassification policy violates his right to due process because it is arbitrary and capricious. Smith apparently contends that because he presented sufficient evidence to show that he was a resident of Texas for other purposes, (i.e., voting, driver's license, car registration) he should also be considered a resident for purposes of in-state tuition. We

disagree. In *Michelson v. Cox*, 476 F.Supp. 1315, 1318-20 (S.D. Iowa 1979), the plaintiff introduced evidence that he was registered to vote in Iowa, had obtained an Iowa driver's license, had registered his car in Iowa, paid rent in Iowa, paid income taxes in Iowa, and intended to take the Iowa bar examination. Plaintiff claimed that this evidence, coupled with his statement that he intended to remain in Iowa, was sufficient to overcome the presumption of nonresidency, and that the school's refusal to reclassify him was arbitrary and capricious.

The court in *Michelson* rejected this argument stating:

> To accept plaintiff's argument would require the University to reclassify as a resident every student who, after attending the University for a year, makes a self-serving declaration that he intends to reside in Iowa permanently and performs a series of "objective" acts, some of

> which are required by law and all of which are customarily done by some nonresident students who do not intend to remain in Iowa after graduation. This would, in effect, create a presumption that any such student *is* a bona fide Iowa resident, thus seriously jeopardizing the University's nonresident tuition program and consequently its entire financial structure. It would remove the tuition decision from the hands of the University and place it in the student's.

Michelson, 476 F.Supp. at 1320.

In *Spielberg v. Board of Regents, University of Michigan*, 601 F.Supp 994, 999-1001 (E.D. Mich. 1985), the plaintiff applied for reclassification and introduced proof that her car was registered and insured in Michigan, that she had a Michigan driver's license, that she voted in Michigan, that she had a Michigan bank account, and that she paid taxes as a Michigan resident. Plaintiff contended that the university's failure to reclassify her in light of this evidence was arbitrary and capricious. The court,

citing *Michelson*, rejected plaintiff's arguments and stated, "[w]hile it is true that the evidence plaintiff offered is consistent with an intent to remain in Michigan, it is equally consistent with an intent to leave Michigan upon graduation." *Id.* at 1001.

We find that the evidence presented by Smith is not such that the refusal to reclassify him as a resident was arbitrary and capricious. A great many nonresident students in Texas obtain Texas driver's licenses, register their cars in Texas, obtain insurance in Texas, rent apartments in Texas, and work in Texas on summer breaks. Nevertheless, many of those students have no intention of remaining in Texas after graduation. Therefore, the refusal to reclassify students as residents automatically based on such evidence is neither arbitrary, nor

capricious.

Because we find that the reclassification rules do not create an irrebuttable presumption of nonresidency, and are not arbitrary or capricious, Smith's points of error relating to due process under the fourteenth amendment of the United States Constitution are overruled.

EQUAL PROTECTION

Smith also claims the State's reclassification policy, and particularly its one-year waiting period, violates his right to equal protection of the laws as guaranteed by the fourteenth amendment of the United States Constitution. Smith argues that the policy impinges on the fundamental right to travel, and should be subject to a strict scrutiny standard of review.

The first case to strike down a

durational residency requirement on the grounds that it impinged upon the fundamental right to travel was *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322 (1969). In *Shapiro*, the Court struck down a one-year waiting period to be eligible for welfare benefits, holding that it penalized the fundamental right to travel. 394 U.S. at 629-31, 89 S.Ct. 1328--29. The case of *Dunn v. Blumstein*, 405 U.S. 230, 360, 92 S.Ct. 995, 1012 (1972), struck down a one-year waiting period to vote in state elections. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 269, 94 S.Ct. 1076, 1088 (1974), struck down a statute that required a one-year waiting period before a new resident could apply for subsidized medical care. As can be seen from these cases, the earliest "right to travel" cases involved the denial of basic rights and necessities to

newcomers in the state.

More recent "right to travel" cases have involved statutes that create permanent distinctions among admittedly bona fide residents based on the length or timing of their residence in the state. In *Zobel v. Williams*, 457 U.S. 55, 65, 102 S.Ct. 2309, 2315 (1982), the state of Alaska sought to apportion certain oil dividend benefits among its residents according to how long the resident had resided in the state. The Court did not reach the right to travel issue because it found that the statute violated even the minimum standard of review because the state was discriminating among its own residents. In *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 911, 106 S.Ct. 2317, 2325 (1986), the Court invalidated a New York statute that awarded a civil service employment

preference to veterans of New York who were also New York residents at the time they served their county. The Court held that this statute violated equal protection because it favored prior resident veterans over resident veterans who had moved to New York after serving their county. *Id.* The Court found that such a distinction between bona fide residents based on length of their residency penalized persons who exercised their constitutional right of interstate migration. *Id.*

We find the reclassification statute distinguishable from either of the two situations in which a statute has been invalidated because it impinged upon the fundamental right to travel. The reclassification statute, and its one-year waiting period, does not involve a basic right or necessity, such as those found in

the *Shapiro* line of cases. The right to receive a lower tuition rate at a state university cannot be equated to the right to receive welfare benefits, medical care, or the right to vote. Neither does the reclassification statute, on its face, seek to apportion or limit the benefits accorded to the citizens of Texas based on the length or timing of their residence. Instead, the reclassification policy seeks to establish which students are in fact bona fide residents of the state of Texas.

We have found no cases that have invalidated a residency requirement for tuition purposes on the basis that it burdens the right to interstate travel. The first case to reject a "right to travel" argument in the context of nonresident tuition was *Starns v. Malkerson*, 326 F.Supp 234, 328 (D. Minn. 1970), *summarily aff'd*, 401 U.S. 985, 91

S.Ct. 1231 (1971). *Hooban v. Boling*, 503 F.2d 648, 651 (6th Cir. 1974), *cert. denied*, 421 U.S. 920, 95 S.Ct. 1585 (1975), also rejected a "right to travel" contention in the context of nonresident tuition as "completely without merit." *Id.* In *Weaver v. Kelton*, 357 F.Supp. 1106, 1110 (E.D. Texas 1973), the very same statute involved in the present case was upheld by the federal district court. In so doing, the court concluded that the right to interstate travel was not involved.

Furthermore, if we determine that the reclassification statute creates a test of bona fide residency, we must conclude that the right to travel is not burdened, "for any person is free to move to a State and to establish residence there." *Martinez v. Bynum*, 461 U.S. 321, 328, 103 S.Ct. 1838, 1842 (1983).

In *Vlandis*, the Court recognized that

> [A] State has a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its own bona fide residents to attend such institutions on a preferential tuition basis . . . . *The State can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, if fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state tuition.*

Vlandis, 412 U.S. at 452-54, 93 S.Ct. at 2236-37. (emphasis added).

Thus, the critical issue this Court must decide is whether the reclassification statute, and the criteria it considers to determine residency for tuition purposes, sets up a test to determine bona fide residency. "Although the meaning may vary according to context, 'residence' generally requires both physical presence and an intention to remain." *Martinez*, 461 U.S. at 330, 103

S.Ct. at 1843.

We find that the criteria set forth in the reclassification rules allows the state to make "virtually certain" that the students to whom it grants the benefits of residency are in fact bona fide Texas residents. For example, it is reasonable to assume that a nonresident student who works full-time has come to the state for the primary purpose of working in the state and making it his home, and not for the primary purpose of taking advantage of Texas' educational system. However, a full-time student who is claiming resident status may be motivated solely by a desire to escape the tuition surcharge, and not by any particular ties to the state. Likewise, it is reasonable to assume that a nonresident student who is a dependent of a Texas resident, or a nonresident student who purchases a homestead in Texas

has established some sort of permanent ties to the state, evidencing an intent to remain in the state. We are not willing to require the state universities to reclassify every student who comes from out-of-state, obtains a Texas driver's license and/or other easily obtainable indicia of residency, and declares his intent to remain in the state after graduation. Thus, we find that the factors set forth in the reclassification statute create a test of bona fide residency for the purpose of resident tuition status. Smith's points of error relating to equal protection under the fourteenth amendment of the United States Constitution are overruled.

TEXAS CONSTITUTIONAL RIGHTS

Smith also argues that even if we determine that the reclassification policy does not violate the due process or equal

protection clauses of the United States Constitution, we may nonetheless find that the Texas Constitution has been violated. We agree that the Texas Constitution may be interpreted to provide greater rights than the United States Constitution. *Davenport v. Garcia*, 834 S.W.2d 4, 11-12 (Tex. 1992). However, Smith has cited no case law to indicate that such an interpretation is required in this case. Smith's points of error under the due process and equal protection clauses of the Texas Constitution are overruled.

BREACH OF CONTRACT

Smith has also claimed that he had a contract with the University, and that the University breached the contract by failing to reclassify him as a resident. Even if we were to assume that a contract existed between Smith and the University, we would necessarily conclude that there

was no breach of that contract because the University correctly classified Smith as a nonresident for purposes of tuition. Smith's points of error concerning breach of contract are overruled.

CONCLUSION

Because we have determined that the reclassification rules promulgated by the Coordinating Board, Texas College and University System, do not set up an irrebuttable presumption of nonresidency, but in fact create a test of bona fide residency for purposes of tuition, the judgment of the trial court is affirmed.[2]

---

[2] Given our disposition of this cause, we do not address Smith's points of error 15 through 20, relating to the issues of sovereign immunity.

/s/ D. Camille Hutson-Dunn
D. Camille Hutson-Dunn
Justice

Chief Justice Oliver-Parrott
and Justice Mirabal also sitting.

Publish. Tex. R. App. P. 90.

Judgment rendered and opinion
delivered March 10, 1994
True Copy Attest:

/s/ Margie Thompson
Margie Thompson
Clerk of Court

APPENDIX "H"

(seal)

In The
Court of Appeals
For The
First District of Texas

NO.01-93-0108-CV

LOREN R. SMITH, Appellant
V.
BOARD OF REGENTS OF THE UNIVERSITY OF HOUSTON SYSTEM, ET AL, Appellee

---

On Appeal from the 125th District Court of Harris County, Texas
Trial Court Cause No. 90-64282

ORDER

On this day come on to be considered the appellant's motion for rehearing. And such motion is hereby **OVERRULED.**

It is so ordered.

PER CURIAM

Panel consisting of: Chief Justice Oliver-Parrott and Justices Dunn and Mirabal

Order entered: April 28, 1994

True Copy Attest:
Margie Thompson, Clerk of the Court

/s/ Cathy McGraw
Chief Deputy

APPENDIX "I"

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

October 6, 1994

Mr. Loren R. Smith
Hughes Watters & Askanase
1415 Louisiana, 37th Floor
Houston, TX 77002

Ms. Janice S. Moss
Office of Attorney General of Texas
Dan Morales, A.G.
P.O. Box 12548
Austin, TX 78711-2548

RE: Case No. 94-0565
Style: LOREN R. SMITH
v. BOARD OF REGENTS OF THE UNIVERSITY OF HOUSTON SYSTEM ET AL.

Dear Counsel:

Today, the Supreme Court of Texas denied the above reference application for writ of error with the notation "Writ Denied".

Respectfully yours,

JOHN T. ADAMS, CLERK

BY: /s/ Michael C. Murphey
Michael C. Murphey,
Deputy Clerk

APPENDIX "J"

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

November 22, 1994

Mr. Loren R. Smith
Hughes Watters & Askanase
1415 Louisiana, 37th Floor
Houston, TX 77002

Ms. Janice S. Moss
Office of Attorney General of Texas
Dan Morales, A.G.
P.O. Box 12548
Austin, TX 78711-2548

RE: Case No. 94-0565
Style: LOREN R. SMITH
v. BOARD OF REGENTS OF THE UNIVERSITY OF HOUSTON SYSTEM ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

JOHN T. ADAMS, CLERK

BY: /s/ Peggy Littlefield
Peggy Littlefield,
Deputy Clerk

APPENDIX "K"

(University seal and graphic)

A Study of the Economic Impact of Variation in the Nonresident Tuition Rate at Public Institutions of Higher Education in South Dakota

Bulletin Number One Hundred Thirty-Two

Business Research Bureau
School of Business
The University of South Dakota
Vermillion, South Dakota

. . . .

Prepared for
Counsel of Presidents
Public Higher Education System
of the State of South Dakota

. . . .

By
Ralph J. Brown and Dennis A. Johnson
Professors of Economics,
School of Business,
University of South Dakota

I. INTRODUCTION

Tuition policy regarding nonresident students at public institutions of higher education has been a subject of considerable controversy. It has been argued in some quarters that nonresident tuition rates should be lowered to encourage nonresident enrollment. Proponents of this proposal often argue that geographic and economic diversity improve the educational environment of the college. (footnote omitted) Another argument for lowering nonresident tuition

rates is that in a time of declining enrollments, efficient utilization of fixed capacity and the viability of certain programs requires policies to maintain minimum enrollments. Finally, it has been argued that these students contribute financially to the state's economy through their spending.

Opponents of lower nonresident tuition rates argue that present rates represent a subsidy to nonresident students and that the first obligation of the state is to fund the educational needs of its own residents. (footnote omitted) In their view the proposed benefits of increased diversity are outweighed by the economic considerations of the nonresident tuition level relative to the cost of educating that student.

Obviously, there are important economic and noneconomic considerations in

the establishment of a proper policy regarding the setting of tuition rates for nonresident students. The purpose of this study is to attempt to provide answers to some of the more important economic questions regarding the setting of nonresident tuition rates by South Dakota public institutions of higher education. This study was designed to explore and attempt to find answers to the following economic questions.

1. What is the likely response in terms of nonresident undergraduate enrollments to a lowering of nonresident tuition rates in South Dakota public institutions of higher education? Would the increased revenue from increased enrollments be sufficient to offset the lower revenues due to reduction in nonresident tuition charges?

2. What is the cost of educating

additional nonresident students in South Dakota public institutions of higher education and is this cost more or less than the additional revenue generated by reducing the tuition rate to attract additional students?

3. What are the other economic benefits to the state's economy in terms of increased spending and tax revenues to be derived from a higher enrollment of nonresident students?

This report is organized as follows: Section II will review the historical pattern of nonresident enrollment at public institutions of higher education in South Dakota, Sections III and IV will review the demand model used to estimate the sensitivity of nonresident enrollment to tuition rates, Sections V and VI will review the cost model and the cost estimates, and Section VII will bring the

demand and cost estimates together. Section VIII will analyze the community impacts of increased enrollment and Section IX will summarize the results and findings of this study.

II. NONRESIDENT ENROLLMENT TRENDS BY SCHOOL

A. University of South Dakota

Nonresident enrollment at the University of South Dakota (USD) has come mainly from surrounding states. Of these states, nearby Iowa and Nebraska have provided the bulk of students attending USD. In 1985, 595 students came from Iowa, while 143 came from Nebraska. In addition, enrollment from . . .

(page four)

. . . .

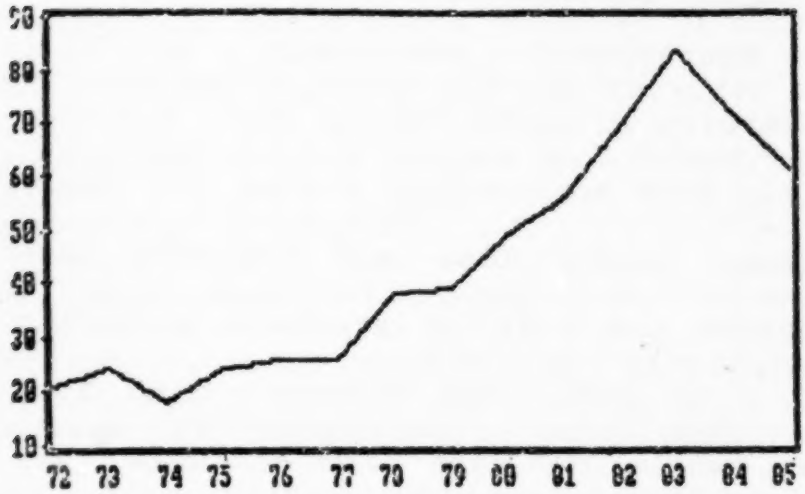
As is the case with Iowa, Minnesota enrollment at USD has declined in recent years from 115 in 1983 to 97 in 1985. Figure 2 shows that prior to 1983,

enrollment steadily increased from a low of 27 in 1976. The tuition reciprocity agreement in 1978 had a very significant impact on enrollment from Minnesota.

. . . .

(page 17)

FIGURE 13: MINNESOTA ENROLLMENT AT SDMT



Obviously, Minnesota has provided the largest number of nonresidents. Figure 14 indicates that reciprocity has had a more powerful impact effect on enrollment at SDSU than any of the other South Dakota colleges and universities. In the three

year period between 1977 and 1980, Minnesota enrollment almost quadrupled from 247 to 953. However, Minnesota has not only been SDSU's largest nonresident contributor; since 1980, its students have accounted for roughly 15 percent of the total undergraduate student body at the school. Minnesota enrollment has declined since 1981, but not nearly enough to undermine its overall importance to the school.

(page 21)

. . . .

The relationship between price and enrollment from Iowa at USD is presented in Figure 16. In this graph the left scale relates to the price (stated as the ratio of nonresident tuition in South Dakota to resident tuition in the state of origin) and the right scale relates to the enrollment level. When the price variable

the nonresident tuition rate charged by public institutions of higher education in South Dakota. We examined the price [price change from one state to the other - footnote omitted] responsiveness of enrollment from Iowa, Minnesota, Nebraska, North Dakota, Wyoming, and all other states and foreign countries at each of the six public institutions of public higher education in South Dakota.

. . . .

In most cases the long-run price elasticity of enrollment demand was price elastic. This means that the percentage change in enrollment response was greater than the percentage price change. The significance of this is that total revenue increases when the nonresident tuition rate is reduced because the revenue gain from the additional students more than offsets the revenue loss from charging the

existing students at a lower rate.

After computing the price elasticity of enrollment demand we were able to calculate the marginal revenue attributable to each additional nonresident student. We found that at the 1985-86 nonresident tuition rate of $69.50 per credit hour, the marginal revenue from each additional nonresident student ranged generally from $0 to $1,415 depending on the price elasticity of demand.

Turning to the second question relating the marginal costs of each additional nonresident student, we were able to compute marginal cost of increased undergraduate enrollment. The results of this analysis indicates that marginal instructional costs are approximately $1,500 and marginal cost of instruction, academic support, and student services summed are approximately $2,200.

Finally, to answer the third question we relied on previous studies of the spending impact of students in the college community. Based on these studies we concluded that the direct and indirect spending impact in the local community ranged from $1,296 to $3,732 per student in 1985 dollars. The state and local sales tax revenue generated per student ranged from $73.36 to $210.30 per year.

B. Conclusions

So what do we conclude from this analysis? First, it appears, assuming reasonable elasticity estimates, that a reduction in the nonresident tuition rate would significantly increase enrollment. Second, assuming a marginal revenue cost of at least $1,500 per student and a maximum marginal revenue of $1,415 per student (footnote omitted) that cutting the nonresident tuition rate would not

generate sufficient revenue to cover the additional cost.

Assuming that there is a desire to increase nonresident enrollment without being too costly to the state, what strategies could be followed? Here are a list of possible strategies that could be used.

. . . .

(page 91)

4. An additional comment relates to the negotiation of tuition rates under reciprocity agreements. For example, when the South Dakota-Minnesota tuition reciprocity agreement was first started in 1978, South Dakota students attending schools in Minnesota paid the Minnesota resident tuition rate, and Minnesota students attending schools in South Dakota paid the South Dakota resident tuition rate. When the agreement was renegotiated

in 1983, both South Dakota and Minnesota nonresident students paid the average of the South Dakota and Minnesota resident tuition rates. The effect of this renegotiation was to raise the price to Minnesotans enrolled in South Dakota and lower the price to South Dakotans enrolling in Minnesota. This change had both positive and negative effects. It tended to hurt South Dakota enrollments but increase net revenues [footnote - Net revenue is defined as the difference between marginal revenue and marginal costs.] This hurt South Dakota enrollment in two ways. First, it encouraged more South Dakota students to enroll in Minnesota. Second, it discouraged Minnesota students from enrolling in South Dakota. Furthermore, if the price elasticity is elastic, as our research indicates it is, it had the effect of

reducing revenue because the revenue lost from the fewer students was not offset by the higher revenue from the existing students. However, from a net revenue point-of-view, it probably increased net revenue because the marginal cost of educating an additional student is undoubtedly higher than the average of the two tuition rates. Therefore, the reduction in enrollment that was not covering the marginal costs increases net revenue.

APPENDIX "L"

(seal of University)

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Colleges of Law and Education

University of Houston
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before the Texas Legislature
House Committee on Higher Education

11 March 1985

. . . .

3) Residency requirements need to be revised as part of any tuition program reform.

Texas is a major "receiver" state in higher education, and college migration data show that the state not only keeps its residents in state to attend college (93%, second only to California's 95%), but "imports" thousands of highly qualified students. In 1975, Texas' net migration was 31,098 students; only California and Massachusetts -- states with superb universities -- and DC, with its prominence as the nation's capital, had more net immigration of students.(footnote omitted) In the ten years since these reported data, Texas undoubtedly has increased its attractiveness for out of state students.

I believe the current law regarding nonresidents (Section 54.054), last revised in 1971, works against the interests of the state of Texas in attracting the brightest students to attend state institutions, and should be amended. The current provision equates "residence" with "domicile" (Section 54.052 a), but then excludes students who move to Texas for college attendance from becoming Texas residents. Of course, the state has a perfect right to do this, and it joins many other states that treat student citizens the same way. However, I believe that "closing our borders" this way prohibits Texas from recruiting and attracting the greatest talent possible; when combined with the 10-times-Texas tuition provisions, the state has erected a great wall to college student migration, one that falsely assumes non-residents to

be a threat to Texas students.

The legislation itself is inconsistent in this regard, for it has erected several "end-runs" around Texas residency requirement and has singled out special groups for reducing or free tuition privileges. Sections 54.051 through 54.210 are chock-full of exemptions and special benefits having nothing to do with duration or domicile. Again, this is perfectly legal, if unwieldy. But the premise of a strict domicile rule is that a Texan, whose taxes go towards supporting Texas institutions, ought to attend a Texas college less expensively than a student from, say, New Mexico or Mexico. Why, then, erect a special provision for border state junior college students (Section 54.060) or for partial waiver to school valedictorians (Section 54.201)? The annual Coordinating

Board audits of exemptions require a review of 18 such provisions.

I urge the committee to repeal the first sentence of Section 54.054 ("A nonresident student classification is presumed to be correct as long as the residence of the individual in the state is primarily for the purpose of attending a educational institution.") and to appoint a special study group to report on Texas residency requirements, in time for the next legislative session.

. . . .

APPENDIX "M"

Texas Admin. Code § 21.23 (West 1993-94):

Persons classified as nonresidents upon first enrollment in an institution of higher education are presumed to be nonresidents for the period during which they continue as students. If such nonresident students withdraw from school and reside in the state while gainfully employed for a period of 12 months, upon reentry into an institution of higher education they will be entitled to be reclassified as residents for tuition purposes. Accumulations of summer and other vacation periods do not satisfy this requirement. Reclassification to resident status after residing in the state for 12 months cannot be based solely upon the student's or the student's spouse's employment, registration to vote, registration of a motor vehicle and

payment of personal property taxes thereon, or the securing of a Texas driver's license. The presumption of "nonresident" is not a conclusive presumption, however, and other facts may be considered to determine if the presumption has been overcome. Material to this determination are business or personal facts or actions unequivocally indicative of a fixed intention to reside permanently in the state. Such facts may include, but are not limited to, the length of residence and full-time employment prior to enrolling in the institution, the fact of full-time employment prior to enrolling in the institution, the fact of full-time employment and the nature of such employment while a student, purchase of a homestead with a substantial down payment, or dependency upon a parent or guardian

who had resided in Texas for at least 12 months immediately preceding the student's enrollment. All of these facts are weighed in the light of the fact that a student's residence while in school is primarily for the purpose of education and not to establish residence, and that decisions of an individual as to residence are generally made after the completion of an education and not before. Students classified as nonresident students shall be considered to retain that status until they make written application for reclassification in the form prescribed by the institution and are officially reclassified in writing as residents of Texas by the proper administrative officers of the institution. Application for reclassification must be submitted prior to the official census date of the relevant term.

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

NO. 94-1603

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

****

LOREN R. SMITH,
Petitioner,

vs.

BOARD OF REGENTS OF THE UNIVERSITY OF HOUSTON SYSTEM, MARIO LUCCHESI, Officially and Individually, and PATRICIA M. CAVANAUGH, Officially and Individually,
Respondents.

****

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

****

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Texas statute determining residency classification for tuition purposes violates the Due Process or Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.

2. Whether the Texas reclassification regulation regarding residency of students for tuition purposes violates the Due Process or Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.

LIST OF PARTIES

Loren R. Smith - Petitioner, Pro Se.

Board of Regents of the University of Houston System - Respondent.

Mario C. Lucchesi, in his official capacity - Respondent.

Patricia M. Cavanaugh, in her official capacity - Respondent.

Janice S. Moss, Assistant Attorney General of the State of Texas - Counsel for Respondents.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF CITATIONS AND AUTHORITIES viii

CONSTITUTIONAL PROVISIONS AND STATUTES 1

STATEMENT OF THE CASE 2

A. INTRODUCTION 2

B. FACTUAL BACKGROUND 2

C. DISPOSITION AND PROCEEDINGS BELOW 3

REASONS FOR DENYING THE WRIT 4

ARGUMENT AND AUTHORITIES 4

I. INTRODUCTION 4

II. THIS COURT SHOULD DENY CERTIORARI BECAUSE THIS COURT HAS ESTABLISHED THAT THE STATES MAY ESTABLISH REASONABLE CRITERIA THROUGH WHICH THEY MAY ASCERTAIN RESIDENCY OF STUDENTS FOR TUITION

PURPOSES, AND THE STATUTE AND REGULATIONS AT ISSUE COMPORT WITH THE STANDARDS ESTABLISHED IN *VLANDIS V. KLINE* AND SUBSEQUENT CASES. 5

III. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE STATUTE, THE RECLASSIFICATION REGULATION, THE ONE-YEAR DURATIONAL RESIDENCY REQUIREMENT TO BE ELIGIBLE FOR RECLASSIFICATION TO PAY THE RESIDENT RATE FOR UNIVERSITY TUITION AND RELATED FACTS UNDER THE STATUTE WHICH MAY BE TAKEN INTO CONSIDERATION FOR RESIDENCY PURPOSES, DO NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION..... 7

IV. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE STATUTE, THE RECLASSIFICATION REGULATION, THE ONE-YEAR DURATIONAL RESIDENCY REQUIREMENT TO BE ELIGIBLE FOR

RECLASSIFICATION TO PAY THE RESIDENT RATE FOR UNIVERSITY TUITION AND RELATED FACTS UNDER THE STATUTE WHICH MAY BE TAKEN INTO CONSIDERATION FOR RESIDENCY PURPOSES, DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION..... 11

A. The State's reclassification policy passes even minimum scrutiny..... 11

B. Strict scrutiny is inapplicable. 16

1. No fundamental right or suspect class is affected. 16
2. The Court of Appeals opinion does not conflict with the opinion of other courts, nor the cases require strict scrunity in this case. 20
   a. Zobel v. Williams..... 20
   b. Martinez v. Bynum..... 21
   c. Hooper v. Bernanillo County Assessor 22
   d. Attorney General of New York v. Soto-Lopez 22
   e. Starns v. Malkerson..... 23
   f. Sturgis v. State of Washington..... 24
   g. Weaver v. Kelton 24
   h. Kelm v. Carlson 25

C. The statute should not be reviewed under intermediate scrutiny..... 25

V. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE SUBJECTIVE BELIEFS OF INDIVIDUALS, INCLUDING THE UNIVERSITY OFFICIALS, REGARDING THE DOMICILE OF PETITIONER ARE IRRELEVANT TO THE DECISION REGARDING HIS RECLASSIFICATION AS A RESIDENT. 27

VI. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE STATISTICAL DATA UPON WHICH PETITIONER RELIES IS AN INVALID BASIS FOR REVIEWING THE CONSTITUTIONALITY OF THE STATUTE, AND SAID DATA IS INAPPLICABLE TO THE INSTANT CAUSE OF ACTION. 28

A. Since there is no fundamental right affected, the statistical data relating to nonresident students is irrelevant and inapplicable. 28

B. The statistical data is further irrelevant, since it relates to factually dissimilar demographics to the cause of action at bar. 28

CONCLUSION 29

TABLE OF CITATIONS AND AUTHORITIES

CASES

Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 106 S.Ct. 2317, 90 L.Ed.2d 899 (1986)..... 22, 23

Black v. Sullivan, 561 F.Supp. 1050 (D.Maine 1983) 8, 9

Brennan v. Stewart, 834 F.2d 1248 (5th Cir. 1988) 10

City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)..... 25, 26

Clarke v. Redeker, 406 F.2d 883 (8th Cir. 1969), *cert. denied*, 396 U.S. 862 (1969) 12

Covell v. Douglas, 501 P.2d 1047 (Colo. 1972)..... 24

Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d. 491 (1970)..... 14

Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972)..... 17

Ferguson v. Skrupa, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963) 9

Graham v. Rochondosa, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971)..... 26

Hooper v. Bernanillo County Assessor, 472 U.S. 612, 105 S.Ct. 2862, 86 L.Ed.2d 487 (1985) 22

Kelm v. Carlson, 473 F.2d 1267 (6th Cir., 1973)..... 25

Kirk v. Board of Regents, 273 Cal.App.2d 430 (1969), *appeal dismissed*, 396 U.S. 554 (1970) 18

Korematsu v. United States, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944) 16

Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911) 14

Lyng v. Castillo, 477 U.S. 635, 106 S.Ct. 2727, 91 L.Ed.2d 527 (1986) 26

Martinez v. Bynum, 461 U.S. 321, 103 S.Ct. 1838, 75 L.Ed.2d 879 (1983) ..... passim

McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961) 14

McLaughlin v. Florida, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964) 16

Memorial Hospital v. Maricopa County, et al., 415 U.S. 238, 94 S.Ct. 1076, 39 L.Ed.2d 206 (1974) ..... passim

Metropolis Theater Co. v. City of Chicago, 228 U.S. 61, 33 S.Ct. 441, 57 L.Ed. 730 (1913) 14

Michelson v. Cox, 476 F.Supp. 1315 (S.D. Iowa 1979) 8

Milles v. Hablvetzel, 456 U.S. 91, 102 S.Ct. 1549, 71 L.Ed.2d 770 (1982) 26

Mississippi University for Women v. Hogan, 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982) 26

Plyler v. Doe, 457 U.S. 202 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) 25, 26

Robertson v. University of New Mexico, 350 F.Supp. 100 (D.N.M. 1972) 24

Samuel v. University of Pittsburg, 375 F. Supp. 1119, 1123 (W.D. Pa. 1974) *(held sex was not a suspect classification) [rev'd on other grounds and remanded for more adequate relief]*, 538 F.2d 991 (3rd Cir. 1976) 17

San Antonio I.S.D. v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) 16, 17, 26

Shapiro v. Thompson, 394 U.S. 613, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) ..... passim

Spielberg v. Board of Regents, University of Michigan, 601 F. Supp. 994 (E.D. Mich. 1985) 8

Starns v. Malkerson, 326 F.Supp., 234 (D.Minn 1970), aff'd, 401 U.S. 985 (1971) ..... passim

Sturgis v. State of Washington, 368 F.Supp. 38 (W.D. Wash. 1973), *aff'd*, 414 U.S. 1057 (1973) 18, 23, 24

United States Department of Agriculture v. Murray, 413 U.S. 508 (1973) 26

Vlandis v. Kline, 412 U. S. 441, 93 S. Ct. 2230, 37 L.Ed.2d 63 (1973). ..... passim

Weaver v. Kelton, 357 F.Supp. 1106

(E.D. Tex. 1973) 8, 15, 24

Weinberger v. Salfi, 422 U.S. 749, 95 S.Ct. 2457, , 45 L.Ed.2d 522 (1975) 10, 11, 12, 14

Zobel v. Williams, 457 U.S. 55, 102 S.Ct. 2309, 72 L.Ed.2d 672 (1982) 20, 21, 22

STATUTES

19 Texas Administrative Code §21.23 (West 1994)..... passim

Texas Education Code Annotated §54.052(a)(1)(2) (Vernon 1987) 1, 1a

Texas Education Code Annotated. §54.052(f) (Vernon 1987) 1, 1a

Texas Education Code Annotated §54.053 (Vernon 1987) 2, 1a

Texas Education Code Annotated §54.054 (Vernon 1987) 2, 1a

UNITED STATES CONSTITUTION

Fourteenth Amendment, Section 1 ..... 1, 7, 1a

OTHER AUTHORITIES

The Constitutionality of Non-resident Tuition, 55 Minn.L.Rev. 1139 (1971) 19

APPENDIX A - EXCERPTS OF STATUTES INVOLVED 1a

NO. 94-1603

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

****

LOREN R. SMITH,
Petitioner,

vs.

BOARD OF REGENTS OF THE UNIVERSITY OF HOUSTON SYSTEM,
MARIO LUCCHESI, Officially and Individually,
and PATRICIA M. CAVANAUGH, Officially and Individually,
Respondents.

****

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

****

TO THE HONORABLE SUPREME COURT:

The Respondents, Board of Regents of University of Houston System, Mario Lucchesi, Officially and Individually, and Patricia M. Cavanaugh, Officially and Individually, respectfully request that this Court deny the Petition for Writ of Certiorari submitted by Petitioner, Loren Smith.

CONSTITUTIONAL PROVISIONS AND STATUTES

The questions presented require application of the following constitutional and statutory provisions: *United States Constitution, Amendment XIV, Section 1; Texas Education Code Annotated §54.052(a)(1)(2)*(Vernon 1987); *Texas Education Code Annotated. §54.052(f)* (Vernon 1987); *Texas*

Education Code Annotated §54.053(Vernon 1987); *Texas Education Code Annotated §54.054* (Vernon 1987); *19 Texas Administrative Code §21.23* (West 1994).

STATEMENT OF THE CASE

A. INTRODUCTION

Many residents of the State of Texas attend Texas universities. Likewise, other nonresident students of Texas universities merely enter the State, as residents of another state, for the purpose of attending a university of the State of Texas. Petitioner, who was a nonresident when he moved to Texas to attend the University of Houston Law Center, challenges the constitutionality of the Texas statutes and regulations regarding the reclassification of nonresident students for tuition purposes on the grounds that the statutes and regulations violate the Due Process and Equal Protection Clauses of the United States Constitution. Petitioner challenges portions of the statute and regulations through which he sought and failed to meet the criteria for status as a resident for tuition purposes. The statute and regulations clearly incorporate many ways in which a nonresident student may establish his status as a bonafide resident of the State of Texas. The question before this Court is whether the Texas statute and regulations which allow the colleges and universities of Texas to charge a higher tuition rate to non-residents of Texas, are constitutional. Respondents submit that there is no constitutional violation in either the statute or the regulations.

B. FACTUAL BACKGROUND

Petitioner Loren Smith moved to Houston, Texas from Stow, Ohio, in August 1987 for the specific and exclusive purpose of attending the University of Houston Law Center, in which he enrolled two weeks after his arrival in Texas. Having failed to establish a bona fide Texas residency for tuition purposes, under the applicable statute and the rules of the Texas Higher Education Coordinating

Board (which is not a defendant in this case, nor are any of its officials), Smith was charged the higher non-resident tuition.

The facts recited by Petitioner in "A. Factual Background" in the "Statement of the Case" portion of his brief, Paragraphs two and three (pages 5-7 of Petitioner's Petition for Writ of Certiorari) are as stipulated by the parties and approved by the trial court on November 15, 1992. The remaining paragraphs contain statements of fact not in the Petitioner's Brief before the Court of Appeals, which statements all relate to (1) the application process in which Petitioner applied for resident status, (2) the subjective belief of certain individuals regarding Petitioner's intent to reside in Texas, and (3) adherence by University officials to the rules and regulations regarding residency.

C. DISPOSITION AND PROCEEDINGS BELOW

Smith sued the University of Houston System, its Board of Regents, and two of its officials, in the 125th Judicial District Court of Harris County, Texas, claiming that the state's residency distinction for state university tuition and its criteria for reclassification as a resident student violated the due process and equal protection guarantees of the United States and Texas Constitutions, impermissibly burdened freedom of travel, and breached his contract with the university. The Court signed a take-nothing judgment in favor of Respondents on October 13, 1992, and the First Court of Appeals for the State of Texas affirmed. On appeal, Smith also assigned error to the District Court's and Court of Appeals' conclusion that sovereign immunity protects the University and its officials.

The Supreme Court of Texas denied Petitioner's Application for Writ of Error on October 6, 1994, and overruled Petitioner's Motion for Rehearing on November

22, 1994. Smith's suit fails on the merits and fails to overcome the defendants' governmental immunity.

REASONS FOR DENYING THE WRIT

ARGUMENT AND AUTHORITIES

I. INTRODUCTION

The questions presented to this court challenge the constitutionality of the Texas statutes pursuant to which the University charged Petitioner nonresident tuition fees instead of resident student fees, since Petitioner moved to Texas approximately two weeks before he enrolled in law school at the University, admitted that he came to Texas to go to law school, and thereafter failed to establish through any of the criteria available through the statute or regulations to prove that he had established residency for tuition purposes.

Petitioner's presentation of the questions narrowly focuses on certain portions of the statute. He chooses to challenge the one-year durational residency requirement and the refusal to count time spent in the state as a full-time university student toward this requirement, in light of clearly established case law that permits states to establish a one-year durational residency requirement. *Vlandis v. Kline,* 412 U. S. 441, 452-53, 93 S. Ct. 2230, 2236-37, 37 L.Ed.2d 63 (1973).

It is noteworthy that although Petitioner narrowly frames the questions for review as the issues of the one-year durational residency requirement and the refusal to count time spent in the state as a full-time university student toward this requirement, the challenged criteria at issue do not represent an exclusive list of the criteria through which Petitioner would be eligible to be declared a resident for tuition purposes, nor does such a presentation of the questions acknowledge that the flexibility of the statute allows for reclassification of a non-resident in many more

ways than what Petitioner challenges.[1] Other factors exist within the statute which would have permitted the University's classification of him as a resident for tuition purposes, had he met those factors. The statute and reclassification regulation are flexible and actually comply with the standards and parameters this Court has established for establishing residency for tuition purposes.

II. THIS COURT SHOULD DENY CERTIORARI BECAUSE THIS COURT HAS ESTABLISHED THAT THE STATES MAY ESTABLISH REASONABLE CRITERIA THROUGH WHICH THEY MAY ASCERTAIN RESIDENCY OF STUDENTS FOR TUITION PURPOSES, AND THE STATUTE AND REGULATIONS AT ISSUE COMPORT WITH THE STANDARDS ESTABLISHED IN *VLANDIS V. KLINE* AND SUBSEQUENT CASES.

The statute and regulations meet the test that this Court has established as reasonable criteria for establishing residency in meeting a legitimate state interest. The Supreme Court has clearly held that a state has a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its own residents to attend such institutions on a preferential tuition basis. *Vlandis, supra*, 412 U.S. at 452-453, 93 S.Ct. at 2236-2237. In *Vlandis v. Kline*, 412 U.S. 441 (1973), the Court opined:

> [A] State has a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its own bona fide residents to attend such institution on a preferential tuition basis.

---

[1] For example, the full-time employment criterion is only one of several factors which the University may consider when deciding whether or not a student is a resident or in fact has come to the state primarily to go to school, as Petitioner did.

Vlandis v. Kline, 412 U.S. 441, 452-458 (1973). Additionally, the Court stated that a state shall not be denied "the right to impose on a student...a reasonable durational residency requirement" so as to fulfill its interest. *Id.* at 452, 2236.

The Texas statute complies with the ruling of *Vlandis,* offering a reasonable durational residency requirement and "reasonable criteria for in-state status" *Vlandis,* 93 S.Ct. at 2237, by which a nonresident student may be reclassified for purposes of tuition. The statute offers several nonexclusive facts and criteria which would support reclassification: residence or full-time employment prior to enrolling as a student; withdrawal from school to establish residence in the state while gainfully employed for a period of 12 months; a nonconclusive presumption policy; other material business or personal facts unequivocally indicative of a fixed intention to reside permanently in the state, including, but not limited to, the length of residence and full-time employment prior to enrolling in the institution, the fact of full-time employment and the nature of such employment while a student, purchase of a homestead with substantial down payment, or dependency upon a parent or guardian who has resided in Texas for at least 12 months immediately preceding the student's enrollment. Petitioner fails to point out that the criteria which he challenges are **nonexclusive factors**, and, in fact, that the criteria in the reclassification regulation comprise a nonexclusive list. The statute specifically provides that

> The presumption of 'nonresident' is not a conclusive presumption, however, and other facts may be considered to determine if the presumption has been overcome. Material to this determination are business or personal facts or actions unequivocally indicative of a fixed intention to reside permanently in the state.

19 Tex. Admin. Code §21.23 (West 1994)

The reason for classifying students for tuition purposes is not to impede travel, but rather to preserve and protect the "quality of its colleges and universities and the right of its own bona fide residents to attend such institutions on a preferential tuition basis." *Vlandis*, 93 S.Ct., at 2237. Such reasonable criteria as the State of Texas has established for determining in-state status is to make "virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates" afforded to bona fide residents. *Id.* Thus, institutions are able to meet the objectives and purposes of maintaining the quality of Texas' publicly financed educational institutions of higher learning, and offering educational opportunities to its own bona fide residents (on a preferential tuition basis).

III. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE STATUTE, THE RECLASSIFICATION REGULATION, THE ONE-YEAR DURATIONAL RESIDENCY REQUIREMENT TO BE ELIGIBLE FOR RECLASSIFICATION TO PAY THE RESIDENT RATE FOR UNIVERSITY TUITION AND RELATED FACTS UNDER THE STATUTE WHICH MAY BE TAKEN INTO CONSIDERATION FOR RESIDENCY PURPOSES, DO NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The Fourteenth Amendment of the United States Constitution provides that no state shall deprive any persons of life, liberty, or property, without due process of law. U.S. Const. amend. XIV, § 1. Petitioner argues that the state's policy of reclassification of non-resident students in public institutions of higher education, for tuition purposes, violates the Due Process Clause. In support of this contention, Petitioner relies on *Vlandis v. Kline*, *supra*, wherein a

Connecticut residence reclassification statute was found to contravene the Due Process Clause, under the "irrebuttable presumption" doctrine. *Id.* 412 U.S. at 452, 93 S.Ct. at 2236. However, as discussed above, the statute considered in *Vlandis* is distinguishable from that in the case at bar.

In addition, the Court of Appeals has cited analogous cases[2] to show that the refusal to reclassify Petitioner was not arbitrary and capricious. Petitioner had obtained a Texas driver's license, registered his car in Texas, rented an apartment in Texas, was registered to vote in Texas, worked in summer breaks in Texas, and further claimed that he planned to stay in Texas. The Court of Appeals found that the evidence was not such to show that the decision not to reclassify him as a resident was arbitrary and capricious, since many students who have no intention of remaining in Texas after graduation also do these same things. Court of Appeals Opinion at 7.

In *Vlandis*, the offending enactment was invalidated because the presumption it created was not only irrebuttable, but also permanent for the entire period that the non-resident student attended the educational institution. *Id.* The policy at issue in this case, on the other hand, creates a rebuttable presumption that is in no way permanent. *19 Tex.Admin. Code § 21.23.* The state's policy allows future reclassification of non-residents after they have overcome the presumption. *Weaver v. Kelton,* 357 F.Supp. 1106, 1110-1111 (E.D. Tex. 1973). As a result, under the reasoning in *Vlandis*, the state's policy does not create an impermissible irrebuttable presumption in derogation of the Due Process Clause.

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[2] *Spielberg v. Board of Regents, University of Michigan,* 601 F. Supp. 994, 999-1001 (E.D. Mich. 1985); *Black v. Sullivan,* 561 F.Supp. 1050, 1064-65 (D. Maine 1983); *Michelson v. Cox,* 476 F.Supp. 1315, 1318-20 (S.D. Iowa 1979);

The Supreme Court has ruled that, under federal due process, where fundamental interests are not affected, a statute will be upheld if it merely bears a rational relationship to a legitimate state interest. *See, Ferguson v. Skrupa*, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963). The *Vlandis* Court stated that

> [I]t is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination. Rather, standards of due process require that the State allow such an individual the opportunity to present evidence showing that he is a bona fide resident entitled to the in-state rates.

Vlandis, 93 S.Ct. at 2236. As the Court of Appeals noted in its opinion, the reclassification rules in Texas do not permanently "freeze" a student in a nonresident status based on the student's classification at the time of application to the University, and a student may obtain reclassification in any number of ways. Opinion of Court of Appeals, p. 5. In addition, Petitioner was given the opportunity to present evidence at the time of his applications for reclassification to show that he was a bona fide resident entitled to the in-state rates, and therefore was not denied due process. Petitioner's Brief, at 9-10. As in *Black v. Sullivan*, 561 F.Supp. 1050, 1064-65 (D.Maine 1983), cited by the Court of Appeals, Opinion, at 6, Petitioner was given a fair opportunity to demonstrate entitlement to reclassification, and the rules on their face do not exclude any class of persons from reclassification. For these reasons, Respondents have shown that the rules and regulations do not create an irrebuttable presumption.

This Court has additionally limited the "irrebuttable presumption" doctrine of *Vlandis*. *Brennan v. Stewart*, 834 F.2d 1248, 1258 (5th Cir. 1988). The Supreme Court has addressed the issue of whether a statute is unconstitutional when it runs the risk of being overinclusive or underinclusive in its application to all individuals, and where it might provide a harsh result to certain individuals. In reviewing a statute enacted where there is legitimate concern to prevent abuse, the applicable constitutional standard requires answering the question whether the legislature could rationally have concluded both that a particular limitation or qualification would protect against the occurrence of the abuse, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule. *Weinberger v. Salfi*, 422 U.S. 749, 777, 95 S.Ct. 2457, 2473, 45 L.Ed.2d 522 (1975). Such is the situation in the instant case. The fact that Petitioner failed to comply with or meet the reasonable regulations of the statute or to bring forward other facts which unequivocally demonstrated his fixed intention to reside permanently in the state does not in and of itself necessitate a finding that his fundamental rights were violated or that there is not a substantial state interest.

In determining the reasonableness of the criteria, the question is not whether a "statutory provision precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute. Such a rule would ban all prophylactic provisions." *Weinberger v. Salfi*, 422 U.S. 749, 777, 95 S.Ct. 2457, 2472, 45 L.Ed.2d 522 (1975). This Court held in *Weinberger* that when the government applies a prophylactic rule or limitation regarding a duration-of-relationship requirement in an effort to support the legitimate state interest of discouraging sham relationships, the possibility that the rule may be overinclusive or underinclusive does not

necessitate that the rule is unconstitutional. *Id.*, 95 S.Ct. at 2472.

IV. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE STATUTE, THE RECLASSIFICATION REGULATION, THE ONE-YEAR DURATIONAL RESIDENCY REQUIREMENT TO BE ELIGIBLE FOR RECLASSIFICATION TO PAY THE RESIDENT RATE FOR UNIVERSITY TUITION AND RELATED FACTS UNDER THE STATUTE WHICH MAY BE TAKEN INTO CONSIDERATION FOR RESIDENCY PURPOSES, DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A. The State's reclassification policy passes even minimum scrutiny.

The statute and regulation at issue establishing a bona fide residence requirement do not differentiate suspect classes, nor impinge on fundamental or important rights. *Martinez v. Bynum*, 461 U.S. 321, 328, 103 S.Ct. 1838, 1842, 75 L.Ed.2d 879 (1983). Thus, the appropriate standard of review is whether the challenged statute and regulation have a rational basis, that is, whether they are rationally related to a legitimate state purpose. *Id.* The Court of Appeals noted that the "critical issue this Court must decide is whether the reclassification statute, and the criteria it considers to determine residency for tuition purposes, sets up a test to determine bona fide residency." Court of Appeals Opinion at 10. Respondents submit that the statutory criteria to determine the residency of a student for tuition purposes bear a rational relation to the legitimate legislative goal of insuring that the State protects and preserves the "quality of its colleges and universities and the right of its own bona fide residents to attend such institutions on a preferential tuition basis." *Vlandis*, 93 S.Ct. at 2237; *see also*

Weinberger v. Salfi, 422 U.S. 749, 772, 95 S.Ct. 2457, 2470, 45 L.Ed.2d 522 (1975).

While courts have invalidated as unconstitutional provisions which have the effect of denying an out-of-state student the right to show that he became a resident of the state after entering a university[3], they have generally upheld the constitutionality of provisions designed to establish a student's bona fide intent to become a resident. *Martinez v. Bynum*, 461 U.S. 321, 325, 103 S.Ct. 1838, 1841 (1983). Rebuttable presumptions of non-residency are constitutional. *Clarke v. Redeker*, 406 F.2d 883 (8th Cir. 1969), *cert. denied*, 396 U.S. 862 (1969). In fact, the Supreme Court has refused to strike down statutes requiring one year of residence as a condition to lower tuition at state institutions of higher education. *Memorial Hospital v. Maricopa County, et al.*, 415 U.S. 238, 258-259, 94 S.Ct. 1076, 1082, 39 L.Ed.2d 206 (1974).

More recently, the Court has noted that it has consistently affirmed requirements that a non-resident student be domiciled primarily as a permanent resident, and not as a student, for one year as an element of bona fide residency. *Martinez, supra*, 461 U.S. at 327 n.6, 103 S.Ct. at 1842 n.6. The Supreme Court stated that a "bona fide residence requirement, appropriately defined and uniformly applied, furthers [a] substantial state interest ... and does not burden or penalize the constitutional right of interstate travel." *Id.* at 328-329, 1842. Further, the Court defined a bona fide residence requirement as one that "simply requires that the person *does* establish residence" before demanding the benefits of such status. *Id.* at 329, 1843. The Court stated that the requirement of a bona fide residence requirement does not violate the Equal Protection Clause of the Fourteenth Amendment. *Id.*, at 328, 1842.

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[3] *Vlandis, supra*, 412 U.S. at 452, 93 S.Ct. at 2236.

When reviewing a claim of residence, the issue is essentially one of domicile. *Vlandis, supra*, 412 U.S. at 454, 93 S.Ct. at 2237. Generally, an individual's domicile is his true, fixed, and permanent home and place of habitation. *Id.* Thus, it follows that a state policy creating a rebuttable presumption of non-residency, for tuition purposes, which conditions reclassification upon one year of in-state domicile, not primarily as a student, as an element of a bona fide intent to establish permanent residency, and which is appropriately defined and uniformly applied, is constitutional under the above line of authority. The state policy at issue is faithful to this line. *19 Tex.Admin. Code § 21.23* (West Oct. 1, 1992).

Petitioner's challenge of Texas' "refusal to count time spent in state for the primary purpose of attending a university towards the period" is not meritorious. Texas is entitled to establish a test whereby it can best determine whether a student, who admits he has moved to the state for the primary purpose of gaining an education (*Petition for Writ of Certiorari, p. 39)*, has taken actions which unequivocally indicate an intention to reside permanently in the state. Full time employment is merely one way of demonstrating this intent.

While this individual prong of Texas' list of exceptions to gain residency may seem unfair to a student who seeks to enroll for a full course load each semester, the regulation does not violate the Equal Protection Clause. The Supreme Court has recognized in a leading case dealing with the application of the Equal Protection Clause that:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classification made by its laws are imperfect. If the classification has some "reasonable

> basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369 (1911). "The problems of government are practical ones and may justify, if they do not require, rough accommodations - illogical, it may be, and unscientific." *Metropolis Theater Co. v. City of Chicago*, 228 U.S. 61, 69-70, 33 S.Ct. 441, 443, 57 L.Ed. 730 (1913). "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961).

Starns v. Malkerson, 326 F.Supp., 234, 239 (D.Minn 1970), aff'd, 401 U.S. 985 (1971), *citing Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d. 491 (1970); *see also Weinberger v. Salfi*, 422 U.S. 749, 770, 95 S.Ct. 2457, 2469, 45 L.Ed.2d 522 (1975).

In the case of *Martinez v. Bynum, supra,* ten years after the *Vlandis decision,* this Court reiterated that a state has a legitimate interest in promulgating preferred tuition rates for residents, and acknowledged that both before and after *Vlandis*, it affirmed decisions upholding one year domiciliary requirements, as elements of bona fide residence, where the domicile was required to be primarily as a permanent resident and not as a student. *Martinez, supra*, 461 U.S. at 325, 327 n.6, 103 S.Ct. at 1842 n.6. The Supreme Court in *Martinez* stated that in *Vlandis,* the Court

> fully recognized that a State has a legitimate interest in protecting and preserving . . . the right of its own bona fide residents to attend [its colleges and universities] on a preferential tuition basis. *Vlandis,*

> 412 U.S. at 452-453, 93 S.Ct. at 2236-37. This legitimate interest permits a State [to] establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates.

Martinez, supra, 461 U.S. at 327-28, 103 S.Ct. 1838 at 1842, quoting *Vlandis*, 412 U.S. at 452-453, 93 S.Ct. at 2236-37. In addition, the *Vlandis* decision turned on the fact that the Connecticut policy created a *permanent irrebuttable* presumption that completely foreclosed any reclassification whatsoever, which the Court found to be repugnant. *Vlandis, supra*, 412 U.S. at 446, 452, 93 S.Ct. at 2233, 2236. By contrast, the policy at issue creates no such presumption, but rather, offers the non-resident student many vehicles to use in overcoming the initial presumption. *Weaver v. Kelton*, 357 F.Supp. 1106, 1110-1111 (E.D. Tex. 1973).

Petitioner's claim that Texas' interest in classifying its students as residents or nonresidents for tuition purposes is small is both shocking and indicative of his not understanding that the legitimate state interest is not just to distinguish between residents and nonresidents, but to provide educational opportunities for its own residents on a preferential basis. *Petitioner's Brief, p. 61.* The State of Texas has far more students each year who seek to be admitted to the universities and colleges of the State as residents than nonresidents. It bears repeating that the fundamental principle at issue here is that the State has a legitimate interest in providing educational opportunities to its bonafide residents before extending such opportunities to nonresidents, who fail to establish their residency prior to enrolling in the universities. *Vlandis*, 93 S.Ct. at 2236-37.

Petitioner argues that the state's policy bears no rational relationship to a legitimate state purpose in light of the indicia of domicile enumerated in *Vlandis*. *Petitioner's Brief at pp. 32-42.* In view of the cases the Court has affirmed following *Vlandis*[4], and the Court's acknowledgment of their validity[5], it appears that any such enumeration was intended only to serve as an example in comparison to the statute that was then being considered. In the present case, the state's reclassification policy allows non-resident students in public institutions of higher education to overcome a rebuttable presumption of non-residence, for tuition purposes, and is rationally related to the state's interest in protecting and preserving the right of its residents to attend such institutions. Upon this basis, the policy withstands the minimum level of judicial scrutiny in Equal Protection jurisprudence. The Court of Appeals held that the "factors set forth in the reclassification statute create a test of bona fide residency for the purpose of resident tuition status." Court of Appeals Opinion, at 11.

B. Strict scrutiny is inapplicable.

1. No fundamental right or suspect class is affected.

Strict judicial scrutiny is inapplicable to the case at bar, since it does not affect the exercise of a "fundamental right," or differentiate a "suspect class," such as race. *San Antonio I.S.D. v. Rodriguez*, 411 U.S. 1, 16, 93 S.Ct. 1278, 1287, 36 L.Ed.2d 16 (1973). Nonresident college graduate students are not claimed to be, nor are they a suspect class. *See generally, McLaughlin v. Florida*, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964) (race held to be "suspect" classification); *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944) (national origin held

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[4] *Sturgis, supra*, 368 F.Supp. at 39 n.1.; *Memorial Hospital, supra*, 415 U.S. at 259-60, 94 S.Ct. at 1082-1083.

[5] *Martinez, supra*, 461 U.S. at 327 n.6, 103 S.Ct. at 1842 n.6.

"suspect" classification). *Samuel v. University of Pittsburg*, 375 F. Supp. 1119, 1123 (W.D. Pa. 1974) (held sex was not a suspect classification) [rev'd on other grounds and remanded for more adequate relief], 538 F.2d 991 (3rd Cir. 1976). Nor is the attainment of higher education a fundamental right. *See, San Antonio School District v. Rodriguez*, 93 S.Ct., at 1297. Thus, in order to invoke strict scrutiny review, Petitioner attacks the Texas statute on the grounds that it is a restriction on the right to travel, which, in circumstances distinguishable from the instant action, does trigger strict scrutiny review. *See generally, Shapiro v. Thompson*, 394 U.S. 613, 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972).

In each instance where the Supreme Court initially permitted strict scrutiny review regarding the right to travel, the penalty on the right to travel was only found where the disparate treatment for newly-arrived "residents" also involved either a fundamental right (the right to vote), such as in the *Dunn* case, or basic necessities of life (food, clothing, shelter, medical care), such as in the *Shapiro* line of cases. Post-graduate education does not involve any of these interests.

When confronted with residency requirements for purposes of tuition costs at public universities, state and federal courts, including the Supreme Court, have determined that such requirements have no significant adverse effect on the right to travel. *See e.g., Shapiro* at 638 n.21, 1333 n.21 (residence requirements regarding tuition do not necessarily penalize the right to travel); *Vlandis v. Kline*, 412 U.S. 441, 452, 93 S.Ct. 2230, 2236 (1973) (state should not be denied the right to impose reasonable residency requirement upon students due to special problem of characteristically transient nature); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 258-259, 94 S.Ct. 1076,

1082 (1974) (declining to strike down residence requirements as a condition to lower tuition at state universities); *Starns v. Malkerson*, 326 F.Supp. 234, 238 (D.Minn 1970), *aff'd*, 401 U.S. 985 (1971) (student residency requirement for tuition purposes does not infringe upon fundamental right and strict scrutiny test inapplicable); *Sturgis v. State of Washington*, 368 F.Supp. 38, 39, n.1 (W.D. Wash. 1973), *aff'd*, 414 U.S. 1057 (1973) (residency requirement for tuition purposes, scrutinized under rational basis test, bore reasonable relationship to legitimate state purpose).

Thus, once it is alleged that the constitutional right to travel has been impeded, strict scrutiny will be applied only if denial of that right affects a basic necessity or fundamental right. This is supported by the Court's recognition in *Maricopa County*, that some durational residence requirements might not substantially penalize the right to travel to the extent necessary to invoke strict scrutiny. *Maricopa County*, 415 U.S. at 258-259. The Court has pointed out in a footnote that tuition residence requirements do not deny students the basic necessities of life. *Id.*, 415 U.S. at 260, n. 15. The Court cites *Starns v. Malkerson*, 326 F.Supp. 234, 238 (D.Minn.1970), aff'd, 401 U.S. 985 (1971), which quoted with approval from *Kirk v. Board of Regents*, 273 Cal.App.2d 430 (1969), appeal dismissed, 396 U.S. 554 (1970) (emphasis added):

> 'While we fully recognize the value of higher education, we cannot equate its attainment with food, clothing and shelter. *Shapiro involved the immediate and pressing need for preservation of life and health* of persons unable to live without public assistance, and their dependent children. Thus, the residence requirement in *Shapiro* could cause great suffering and even loss of life. The durational residence requirement for attendance at publicly

> financed institutions of higher learning [does] not involve similar risks. Nor was petitioner ... precluded from the benefit of obtaining higher education. Charging higher tuition fees to nonresident students cannot be equated with granting of basic subsistence to one class of needy residents while denying it to an equally needy class of residents.'
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> See also Note, The Constitutionality of Non-resident Tuition, 55 Minn.L.Rev. 1139, 1149-1158 (1971). Moreover, in *Vlandis, supra,* the Court observed that "special problems [are] involved in determining the bona fide residence of college students who come from out of State to attend [a] public university ...," since those students are characteristically transient, 412 U.S., at 452, 93 S.Ct., at 2236.

Maricopa County, 415 U.S. at 260 n.15. The Court, thus, explicitly stated that which it had foreshadowed in *Shapiro*, that is, that tuition residence requirements do not, in and of themselves, constitute a penalty on interstate travel. By summarily affirming the decision of the federal district court in *Starns v. Malkerson*, the Supreme Court has approved a lower court's refusal to apply a strict scrutiny review in a residence tuition case. In applying the rational basis standard of scrutiny, the Court held that the regulatory classification was reasonably related to a legitimate objective of the State of Minnesota. The Supreme Court reaffirmed this important point in *Vlandis v. Kline*, 412 U.S. 441 (1973), in which the Court opined:

> [A] State has a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its own bona fide residents to attend such institution on a preferential tuition basis.

Vlandis v. Kline, 412 U.S. 441, 452-458 (1973).

2. The Court of Appeals opinion does not conflict with the opinion of other courts, nor the cases require strict scrunity in this case.

As noted in the Court of Appeals Opinion, the Court has also permitted strict scrutiny review in more recent "right to travel" cases where statutes have created permanent distinctions among admittedly bona fide residents of a state based on the length or timing of their residence in the state. The cases which Petitioner cites are distinguishable, and Petitioner's reliance on these cases is flawed. Many of the cases differ from the Texas statute because they distinguish between residents, whereas the Texas statute distinguishes between residents and nonresidents.

a. Zobel v. Williams

In *Zobel v. Williams*, 457 U.S. 55, 102 S.Ct. 2309, 72 L.Ed.2d 672 (1982), the Supreme Court merely struck down the statute without deciding what level of scrutiny should be applied because the statute failed to meet even the minimum rationality test. *Id.* at 60-61. The Alaska statute created permanent distinctions between classes of bona fide residents based on the length of residence in the state. *Id.* at 59. The facts in *Zobel* differ from residence requirements for tuition purposes in that the Alaska statute discriminated retrospectively between classes of admittedly bona fide residents, and thus the facts in *Zobel* do not support an extension of its logic to durational residence requirements for the purposes of tuition.

In *Zobel*, a law that distinguished persons who were already residents, one from the other, by distributing funds from oil proceeds of the state to its residents based on the length of time each had been a resident was held unconstitutional because it failed to satisfy even a rational basis test. In explaining *Starns* in a footnote, the Court stated

that *Starns* "cannot be read as a contrary decision of this Court." *Zobel,* 102 S.Ct. at 2315, n. 13. Thus, the Court did not disapprove of the holding that may classify students on the basis of residence for tuition purposes. It only stated that the durational requirement approved of in *Starns* was to be viewed as a test of bona fide residency. *Zobel*, 457 U.S. at 64, 102 S.Ct. at 2315, fn. 13. The implicit approval in *Zobel* of charging nonresidents a higher rate of tuition is justifiable. States have a legitimate interest in maintaining the quality of their universities and providing greater educational opportunities for their legitimate residents. *Vlandis,* 93 S.Ct. at 2236, 2237.

b. Martinez v. Bynum

In *Martinez v. Bynum*, 461 U.S. 321, 103 S.Ct. 1838, 75 L.Ed.2d 879 (1983), the Supreme Court upheld a Texas Education Code provision which denied tuition-free admission to the Texas public schools to a minor who lived apart from a parent or guardian if his presence in the school district was for the primary purpose of attending free public schools. Roberto Morales, a young child born in the United States and thus a United States citizen by birth, lived with his sister for the primary purpose of attending school. Because he did not reside with his parents or guardian in the school district, and because he was in Texas for the primary purpose of attending school, the statute denied Morales tuition-free admission to the Texas schools. The Court upheld the Texas statute, finding that such a requirement furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by its residents. *Id.* at 328. The Court opined that a bona fide residence requirement does not burden the constitutional right to travel because a person is free to move to a state and establish residence there. *Id.* at 328-29. Similarly, Texas' residence requirement for higher education tuition purposes does not

recognize as a "resident" a student who moves to Texas for the primary purpose of attending a Texas university.

The *Martinez* court found that the Texas statute met the "domiciliary" test because while the statute compelled a school district to permit a child to attend school tuition-free if he had a bona fide intention to remain indefinitely (that is, if he had a reason for being there other than his desire to attend school) the statute went even further and allowed some children to attend school even if they did not intend to remain in the school district indefinitely. Similarly, the Texas Higher Education Coordinating Board has provided numerous exceptions which qualify out-of-state students to receive residence status for tuition purposes.

c. Hooper v. Bernanillo County Assessor

In *Hooper v. Bernanillo County Assessor*, 472 U.S. 612, 105 S.Ct. 2862, 86 L.Ed.2d 487 (1985), the Supreme Court found "that the New Mexico statute suffers from the same constitutional flaw as the Alaska statute in *Zobel*," *Id., at 2868,* which used length of state residence to distinguish between persons who were already bona fide residents of New Mexico, not between persons who were residents and nonresidents. The *Hooper* Court made it clear that the "State may not favor established residents over new residents." *Id.* Petitioner's reliance on *Hooper* and *Zobel* is misplaced in that the instant cause of action contests distinctions between residents and non-residents, while the classifications in *Hooper* and *Zobel* were between residents only. Petitioner never established residency in the State of Texas prior to enrolling in school.

d. Attorney General of New York v. Soto-Lopez

In *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 106 S.Ct. 2317, 90 L.Ed.2d 899 (1986), the Court

once again applied the penalty analysis, where a statute created classifications between persons who were already residents. The statute reviewed in *Soto* offered preferential civil service employment to veterans who were residents prior to serving in the military (thus, preferential treatment to one class of residents over other residents). This case is distinguishable from the instant cause of action as *Soto* represents disallowing the classifications of persons who were all residents of the state by favoring residents "at a past fixed point over those who were not New York residents at the same point in their lives." *Id.*, at 905.

The Court has yet to recognize that classification of students as either resident or non-resident for tuition purposes infringes upon the right to travel. In fact, since *Shapiro*, where the Court held the law need only penalize the exercise of the right to travel for it to be unconstitutional, the Court has twice had the opportunity to invalidate laws requiring non-residents to pay higher tuition rates and has declined to do so. In both cases, the Court has affirmed without opinion the lower courts' approval of the laws. *Starns*, 326 F.Supp. 234 (D.Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971); *Sturgis*, 368 F.Supp. 38 1973, *aff'd mem.*, 414 U.S. 1057 (1973).

e. Starns v. Malkerson

In *Starns v. Malkerson*, 326 F.Supp. 234 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971), the district court found, and the Supreme Court affirmed, that higher tuition rates for nonresidents did not in fact deter travel, noting that 6,000 of the 50,000 students enrolled in the university were nonresidents. *Id.* at 238. It also held that the one-year waiting period before new residents could be entitled to the in-state tuition rates would not prevent "any appreciable number of persons from moving into the state." *Id.* at 237-238.

f. Sturgis v. State of Washington

The Supreme Court again affirmed a law virtually identical to the one challenged in *Starns*. *Sturgis v. State of Washington*, 368 F.Supp. 38 (1973), *aff'd mem.*, 414 U.S. 1057 (1973). The district court in *Sturgis* also looked to the large number of nonresidents attending the university to show that the higher tuition rates for nonresidents did not deter travel. In this case 5,913 of 34,125 students were nonresidents. *Id.* at 40.

g. Weaver v. Kelton

In *Weaver v. Kelton*, 357 F.Supp. 1106 (E.D. Tex., 1973) the court specifically stated that strict scrutiny was not implicated because the court distinguished the right to travel regarding the basic necessities of life and the right to travel related to obtaining an education, and the court further refused to recognize the right to equal access to an education as a fundamental right. *Id.*, at 1109, 1110. Petitioner's reliance on the *Weaver* language to compare his situation with the *Robertson*[6] and *Covell*[7] cases is misplaced, in that the *Weaver* court distinguished the statutes at issue in the *Robertson* and *Covell* cases from the Texas statutes at issue:

> however, the Texas statutes are easily distinguishable in that they make allowance for future reclassification of nonresidents after they have overcome the presumptions set out in the statutes.

Weaver v Kelton, 357 F.Supp. 1106, at 1111.

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[6] *Robertson v. University of New Mexico*, 350 F.Supp. 100 (D.N.M. 1972).

[7] *Covell v. Douglas*, 501 P.2d 1047 (Colo. 1972).

h. Kelm v. Carlson

Kelm v. Carlson, 473 F.2d 1267 (6th Cir., 1973) is distinguishable in that the requirement in the statute in *Kelm* that the nonresident prove future employment after graduation in the State of Ohio, was beyond the control of the applicant. *Id.*, at 1271. This requirement is not analogous to the reasonable factors in the Texas statute. The Sixth Circuit stated:

> As we have indicated, we recognize that Ohio and its universities have a right to charge different fees to out-of-state residents than to its own citizens. We also recognize that it is neither arbitrary nor unreasonable for it to place a strong burden of proof as to change of residence on a former out-of-state student who claims Ohio residency lest such claim be founded only upon the student's desire to escape the tuition surcharge.

Id., p. 1271 (emphasis added). Likewise, Texas and its universities have a right to charge different fees to out-of-state residents who fail to establish their residency in Texas.

C. The statute should not be reviewed under intermediate scrutiny.

The middle tier of judicial scrutiny is reserved for instances where state legislation has infringed upon an important (yet not fundamental) right, or has created a sensitive (yet not suspect) classification. *Plyler v. Doe*, 457 U.S. 202, 223-224, 102 S.Ct. 2382, 2398, 72 L.Ed.2d 786 (1982). "Important" rights or interests, for Equal Protection analysis, are those rights or interests which tend to disempower a particular group. The creation of a permanent underclass is the harm that is specifically guarded against. *See, e.g., City of Cleburne v. Cleburne Living Center*, 473

U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (shelter); *Plyler v. Doe*, 457 U.S. 202 (1982) (elementary education); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (9174) (medical services); *United States Department of Agriculture v. Murray*, 413 U.S. 508 (1973) (food); and *Shapiro v. Thompson*, 394 U.S. 618 (1969) (welfare benefits).

"Sensitive" classes, for Equal Protection analysis, have generally been those that are based on personal, immutable characteristics. *See, e.g., Mississippi University for Women v. Hogan*, 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982) (gender); *Milles v. Hablvetzel*, 456 U.S. 91, 102 S.Ct. 1549, 71 L.Ed.2d 770 (1982) (illegitimacy); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (mental retardation); *Graham v. Rochondosa*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971) (alienage). The status of a nonresident graduate student is not personal, as there are no personal characteristics that can be identified for discrimination purposes. Nor is the status immutable, that is, non-changeable, because a person may change his residence. The Court's reasoning in denying "quasi-suspect" or "sensitive" status aptly applies to nonresident graduate students: "...as a historical matter, [members of the class] have not been subjected to discrimination; they do not exhibit obvious immutable, or distinguishing characteristics that define them as a discrete group; and they are not a minority or politically powerless." *Lyng v. Castillo*, 477 U.S. 635, 638, 106 S.Ct. 2727, 2729, 91 L.Ed.2d 527 (1986).

Laws affecting the attainment of higher education have not been categorized by the Supreme Court as infringing on "important" rights. *Rodriguez, supra*, 411 U.S. at 35, 93 S.Ct. at 1297 (education is not among the rights afforded explicit protection under the U.S. Constitution); nor can it be said that non-resident university students display the traditional characteristics of a "quasi-suspect" class. *See, Lyng, supra*, 477 U.S. at 638, 106 S.Ct. at 2729.

Graduate students as well as undergraduate students are not an underclass, nor will they be made so by a law affecting the privilege of obtaining further education. It would be clearly erroneous to apply a "mid-tier" or "intermediate" level analysis to an equal protection challenge involving alleged disparate treatment in obtaining a cheaper post-graduate education. The educational privilege involved here is simply not an "important" right involving a "sensitive" class of persons. Therefore, even a heightened scrutiny analysis of the state's reclassification policy is inappropriate.

Even if such scrutiny is applied, however, the state's policy is substantially related to a legitimate governmental purpose of protecting and preserving the quality of its colleges and universities and the right of its own residents to attend such institutions on a preferential tuition basis and the right to impose on a student...a reasonable durational residency requirement. *Vlandis, supra*, 412 U.S. at 452-453, 93 S.Ct. at 2236-2237.

V. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE SUBJECTIVE BELIEFS OF INDIVIDUALS, INCLUDING THE UNIVERSITY OFFICIALS, REGARDING THE DOMICILE OF PETITIONER ARE IRRELEVANT TO THE DECISION REGARDING HIS RECLASSIFICATION AS A RESIDENT.

Petitioner relies heavily on the subjective beliefs of different University officials in his attempt to show that these individuals should have known that he would stay in Texas post graduation. It is noteworthy that the statutes and the rules and regulations provide several exceptions to nonresident status, but that they do not provide for the subjective beliefs of university officials as a basis for determining the eligibility of an applicant to be reclassified. Thus, regardless of what the individuals may have thought, felt or believed personally regarding Petitioner's intent to stay in Texas after his graduation, those individual

beliefs are irrelevant to the decision regarding the constitutionality of the statute. Petitioner failed to provide sufficient objective facts to show that he was a Texas resident. The facts that Petitioner came to Texas to study law, that he arrived in Texas only two weeks prior to enrolling in the School of Law at the University, and thus had not established his residency in Texas for the purpose of determining his resident status for tuition purposes are as equally consistent with a nonresident student's intent to leave Texas, as they are with a nonresident student who remains in Texas post graduation.

VI. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE STATISTICAL DATA UPON WHICH PETITIONER RELIES IS AN INVALID BASIS FOR REVIEWING THE CONSTITUTIONALITY OF THE STATUTE, AND SAID DATA IS INAPPLICABLE TO THE INSTANT CAUSE OF ACTION.

A. Since there is no fundamental right affected, the statistical data relating to nonresident students is irrelevant and inapplicable.

Petitioner relies greatly on the expert testimony of Ralph Brown and Dennis Johnson to prove that higher nonresident tuition rates will have a detrimental impact on interstate migration. Doctors Brown and Johnson conducted a study in South Dakota and neighboring states *(See Appendix K to Petition for Writ of Certiorari)* which indicated that as nonresident tuition increases, nonresident enrollment decreases. Since there is no fundamental right implicated in this cause of action, supra, including the right to travel, said statistical data is inapplicable and irrelevant.

B. The statistical data is further irrelevant, since it relates to factually dissimilar demographics to the cause of action at bar.

Further, the study cited by Petitioner relates to a sampling of undergraduate student populations, as opposed to graduate students such as Petitioner. The study cited

bears no relation to any alleged impact on enrollment in post-graduate programs (such as the law program at the University of Houston) wherein demand for graduate enrollment is less sensitive to price fluctuations than undergraduate enrollment. The study was also conducted in South Dakota and neighboring states, whose population base is generally different from that of the urban population base, such as that of Houston which ranks among the top ten cities in the United States, in terms of population. *Appendix K to Petition for Writ of Certiorari.* The goals, objectives, intents and purposes of academia and education would vary significantly in the educational environment and framework in these two population bases. The types of students and their related academic interests vary differently according to the location; thus, the study may be significantly flawed as to urban areas, such as Houston. Such differences would reflect different results in a study such as the one cited by Petitioner if conducted at the University of Houston, particularly as it relates to a graduate professional program, such as law. Petitioner bases his argument primarily on statistical evidence applied previously to undergraduate programs in the Midwest. As shown supra, there is no sound basis in prior case law to apply strict scrutiny of the statutes in this case, on the basis of the study cited by Petitioner.

CONCLUSION

Respondents respectfully request that this Court deny Petitioner's Writ of Certiorari to the United States Supreme Court.

Respectfully submitted,

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APPENDIX A -- EXCERPTS OF STATUTES INVOLVED

(1) *United States Constitution, Amendment XIV, Section 1*:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

(2) *Texas Education Code Annotated §54.052(a)(1)(2)*(Vernon 1987):

In this subchapter:

(1) "Residence" means "domicile."
(2) "Resided in" means "domiciled in."

(3) *Texas Education Code Annotated. §54.052(f)* (Vernon 1987):

An individual who is 18 years or over who resides out of the state or who has come from outside Texas and who registers in an educational institution before having resided in Texas for a 12-month period shall be classified as a nonresident student.

(4) *Texas Education Code Annotated §54.053*(Vernon 1987):

The governing board of each institution required by this chapter to charge a nonresident tuition or registration fee is subject to the rules, regulations, and interpretations issued by the Coordinating Board, Texas College and University System, for the administration of the nonresident tuition provisions of this subchapter....

(5) *Texas Education Code Annotated §54.054* (Vernon 1987):

A nonresident student classification is presumed to be correct as long as the residence of the individual in the state is primarily for the purpose of attending an educational institution. After residing in Texas for at least twelve (12) months, a nonresident may be reclassified as a resident student as provided in the rules and regulations adopted by the Coordinating Board, Texas College and University System. Any individual reclassified as a resident student is entitled to pay the tuition fee for a resident of Texas at any subsequent registration as long as he continues to maintain his legal residence in Texas.....

(6) *19 Texas Administrative Code §21.23* (West 1994):

Reclassification. Persons classified as nonresident students upon first enrollment in an institution of higher education are presumed to be nonresidents for the period during which they continue as students. If such nonresident students withdraw from school and reside in the state while gainfully employed for a period of 12 months, upon re-entry into an institution of higher education they will be entitled to be reclassified as residents for tuition purposes. Accumulations of summer and other vacation periods do not satisfy this requirement. Reclassification to resident status after residing in the state for 12 months cannot be based solely upon the student's or the student's spouse's employment, registration to vote, registration of a motor vehicle and payment of personal property taxes thereon, or the securing of a Texas driver's license. The presumption of "nonresident" is not a conclusive presumption, however, and other facts may be considered to determine if the presumption has been overcome. Material to this determination are business or personal facts or actions unequivocally indicative of a fixed intention to reside permanently in the state. Such facts may include, but are not limited to, the length of residence and

full-time employment prior to enrolling in the institution, the fact of full-time employment and the nature of such employment while a student, purchase of a homestead with substantial down payment, or dependency upon a parent or guardian who has resided in Texas for at least 12 months immediately preceding the student's enrollment. All of these facts are weighed in the light of the fact that a student's residence while in school is primarily for the purpose of education and not to establish residence, and that decisions of an individual as to residence are generally made after the completion of an education and not before. Students classified as nonresident students shall be considered to retain that status until they make written application for reclassification in the form prescribed by the institution and are officially reclassified in writing as residents of Texas by the proper administrative officers of the institution. Application for reclassification must be submitted prior to the official census date of the relevant term.